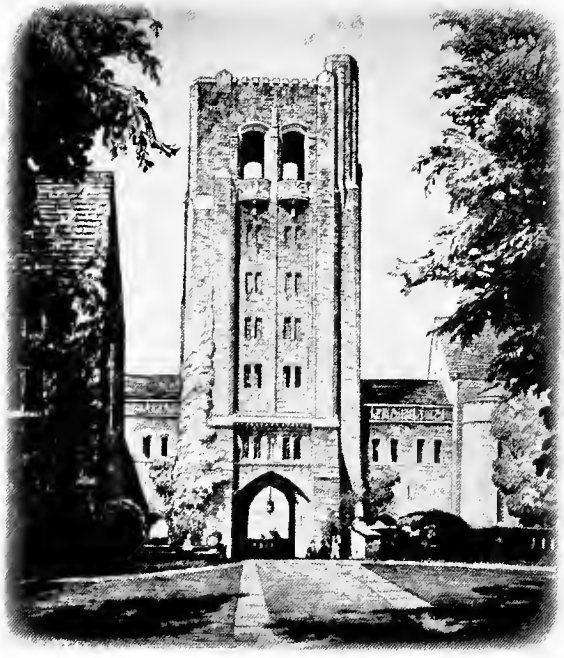

HISTORY

OF THE

COURT OF CHANCERY IN NOVA SCOTIA

BY

HON. CHARLES J. TOWNSHEND,

One of the Judges of the Supreme Court of Nova Scotia.

TORONTO:

THE CARSWELL CO., LIMITED,

1900.

HISTORICAL ACCOUNT

OF THE

COURTS OF JUDICATURE IN NOVA SCOTIA.

THE object of this paper is to present an outline of the history of the several courts of justice both civil and criminal which have administered the laws of this Province from its earliest settlement to the present day—to trace the origin of their jurisdiction—to follow in historical sequence their growth and development; to mark the various changes and modifications in their constitution and procedure, and to note some of the peculiarities of our judicial system. This information is to be found principally in the archives of the Province, which, owing to the care of the late Dr. Aikins have been preserved and arranged in an accessible form. Too much credit cannot be given to that learned and honoured Nova Scotian for the zeal and fidelity with which he performed that useful work.

I take more pleasure in publicly bearing testimony to his honourable character, and accurate work, because not long since both were violently assailed in a work which largely dealt with his labour in connection with the Provincial Archives. No one who knew that venerable and highly esteemed gentleman would for a moment credit such aspersions, but with the outside world such slanders uncontradicted might have some weight.

In these archives are to be found the Royal Commissions to our early Governors, the Royal Instructions under which they acted, their voluminous correspondence with the Lords

of Trade, at that period in charge of colonial affairs in England, the Statutes, Orders and Regulations passed before the Legislature was first convened by the Governor and Council in carrying out these instructions. All these must be consulted, and, lastly, the many volumes of statutes enacted by the first and succeeding Legislatures in order to obtain a clear and connected view of the origin and evolution of our Courts of Justice. For these reasons it is not possible to vouch for the absolute accuracy in all details of the account I have ventured to give in these pages. I trust at least material has been brought together which may aid some future student of the subject in pursuing his investigations.

Prior to the landing of Cornwallis and his band of immigrants, the seat of government was the ancient town of Annapolis Royal, then garrisoned by British soldiers under Paul Mascarene. The executive government, both civil and military, was administered by him in conjunction with a council composed of officers of the army then on the station. Murdoch in his Epitome of the Laws of Nova Scotia tells us: "From the acquisition of Nova Scotia in 1713 till 1749 a kind of civil government existed at Annapolis in the title of Governor held by the commanding officer of a regiment stationed there. He had also a few councillors, such as his major and senior captain to assist him, but his post was a little village, and the French Acadians allowed all their affairs to be managed by their cures, having among them neither magistrates, lawyers, nor any kind of civil officers. The English did not attempt colonization here till 1749, when the appointments of Governor, Lieutenant-Governor and Councillors were conferred on the commander of the troops, and principal colonists at Halifax, who erected Courts of Justice, and passed ordinances, and under their rule the colony was managed until 1758" (*a*).

This statement is not quite accurate, perhaps I should say does not fully present the position of matters. On reference to Calnek's History of the County of Annapolis at

(*a*) Vol. I, p. 59.

page 69, I find the following : "The year 1721 was marked by the establishment of a Court of Judicature at Annapolis. At a meeting of the Council held on the 10th day of April it was resolved 'That the Governor and Council do sit as a General Court or Court of Judicature four times a year.' They then appointed the first Tuesdays in February, May, August and November for the sittings of the Court. It likewise appears that in March, 1727, they issued the first commission of peace in this province, by which Adams, Skeene and Shireff were appointed Justices of the Peace to form a civil court, their judgment to be reported to the Lieutenant-Governor for confirmation."

The Court so constituted exercised both Civil and Criminal jurisdiction, as we find reports of several cases heard and decided by them. One is so curious and interesting that I extract from the same volume an account of the trial and punishment. "It was in this year, also," says the author, "that a Council was held in the house of John Adams to consider a complaint made by Governor Armstrong against Robert Nichols, his servant, for an assault upon him made at Canso nearly a year before. He was found guilty and sentenced as follows: 'You, Robert Nichols, being found guilty of the crime wherewith thou art charged by the Honourable Lawrence Armstrong, Lieutenant-Governor and Commander-in-Chief of this His Majesty's province of Nova Scotia, the punishment therefor inflicted on thee is to sit upon a gallows three days, half an hour each day, with a rope about thy neck and a paper on your head whereon shall be wrote in capital letters 'Audacious villian,' and afterwards thou are to be whipped at a cart tail from the prison to the uppermost house on the cape and from thence back again to the prison house, receiving each hundred paces five stripes upon your bare back with a cat o' nine tails, and then thou art to be turned over for a soldier."

In 1732 the same Court tried and decided a suit between Joseph Jennings and William Winnett respecting the ownership of a house and premises. At this trial we have

the first instance of a lawyer practising his profession in the province, by the name of Ross. In all probability this gentleman was the progenitor of the many distinguished lawyers who have adorned our judicial annals.

In August, 1734, an action for slander was tried in which Mary Davis was plaintiff and Jane Picot, wife of Louis Thibault, was defendant. The decision was in plaintiff's favour, and the unfortunate defendant was sentenced "to be ducked on Saturday next, 10th inst. at high water,"—no light punishment in view of the muddy waters of Annapolis. At the instance, however, of the plaintiff, this punishment was commuted to publicly asking her pardon at the church door.

Matthew Henry was convicted before this Court of larceny and sentenced to receive fifty lashes on his bare back and to return the money.

Among the magistrates and officers appointed to conduct the proceedings of this Court I find the names of several French Acadians, which would indicate that the quarrels and litigation between these people were not exclusively settled by their cures. Early accounts represent them to have been of a very litigious character, and not that sweet peace-loving people so celebrated in modern literature.

The foregoing is sufficient authority for the statement that Courts of Judicature of some description existed at the date of Cornwallis' arrival in June, 1749. From that time all jurisdiction so exercised must have ceased, and for the foundation of our judicial system we must look to the commission of Cornwallis and the acts and ordinances of his Council passed before the first House of Assembly met, 1758, and the Royal Instructions conveyed to him and his successors.

The commission appointing the Hon. Edward Cornwallis, Governor of Nova Scotia bears date 6th May, 1749. He arrived in Halifax on June 21st following in the sloop of war "Sphinx," and immediately summoned Colonel Mascarene from Annapolis with five of his Council to meet at

Halifax for the purpose of constituting the government of the colony. On Friday, July 14th, the new Council were appointed and sworn into office, and a Council was for the first time held on board the transport "Beaufort." Their names were Paul Mascarene, John Gorham, Benjamin Green, John Salisbury and Hugh Daudin, and on the 17th July, at another meeting, Wm. Steele was appointed and sworn in on the 27th July, Peregrine Thomas Hopson; on the 28th July, Robert Ellison and James Frances Mercer were added, and on the 31st July John Horneman and Charles Lawrence. Edward How was also sworn in on the 13th of August. These were the men in conjunction with Cornwallis who took the first steps in the formation of the judicial system of our province.

On the 18th of July the Governor-in-Council made the first appointment of Justices of the Peace for the township of Halifax as follows: John Brewse, Robert Ewer, John Collier and John Duport.

Cornwallis' commission conferred very extensive and necessary powers. We are not at present concerned with any except those relating to the administration of justice and the making of laws. That part reads as follows: "And for the better administration of justice and the management of the public affairs of our said province, we hereby give and grant unto you the said Edward Cornwallis full power and authority to choose, nominate, and appoint such fitting and discreet persons as you shall either find there or carry along with you, not exceeding the number of twelve, to be our Council in said province—as also to nominate and appoint under your hand and seal all and such other officers and ministers as you shall judge proper and necessary for our service and the good of the people whom we shall settle in said province until our future will and pleasure shall be known. . . .

"And likewise that you take the usual oath for the due execution of the office and trust of our Captain General and

Governor-in-Chief of our said Province for the due and impartial administration of Justice. . . .

"And we do give and grant unto you full power and authority, with the advice and consent of our said Council from time to time, as need shall require, to summon and call general assemblies of the freeholders and planters within your government according to the usage of the rest of our colonies and plantations in America, and we do by these presents give and grant unto you the said Edward Cornwallis full power and authority, with the advice and counsel of our said council, to erect, constitute and establish such and so many courts of Judicature and public justice within our said province and dominion as you and they shall think fit and necessary for the hearing and determining of causes as well criminal as civil according to law and equity and for the awarding of execution thereupon with all reasonable and necessary power, authorities, fees and privileges belonging thereunto, as also to appoint and commission fit persons in the several parts of your government to administer the oaths mentioned in the aforesaid Act entitled 'An Act for the Security of His Majesty's Person and Government, and the succession of the Crown in the heirs of the late Princess Sophia being Protestants, and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors,' as also to tender and administer the aforesaid declaration unto such persons belonging to the said Court as shall be obliged to take the same.

"And we do hereby authorize and empower you to constitute and appoint Judges, and in cases requisite, commissioners of Oyer and Terminer, Justices of the Peace, and other necessary officers and ministers in our said Province for the better administration of Justice and putting the law in execution, to administer or cause to be administered unto them such oath or oaths as are usually given for the due execution and performance of offices and places and for the clearing of truth in judicial cases. . . .

And that you the said Edward Cornwallis, with the advice and consent of our said Council and assembly, or the major part of them respectively, shall have full power and authority to make, constitute and order laws, statutes and ordinances for the public peace, welfare and good government of our said province, and the people and inhabitants thereof, and such others as shall resort thereto, and for the benefit of us, our heirs and successors, which said laws, statutes and ordinances are not to be repugnant, but as near as may be agreeable to the laws and statutes of this country of Great Britain."

From the language of this commission the full and extensive powers conferred upon the Governor and Council are easily gathered. Such wide and plenary jurisdiction was a necessary incident to the founding of a new colony, which Nova Scotia was, so far as the English settlement was concerned. It is further to be borne in mind that, with the exception of the garrison at Annapolis, no English settlement then existed, and that the population of other parts of the province consisted of French Acadians and Indians. No division of the province into districts or counties had taken place, and such ordinances and regulations as were made, referred principally to the town of Halifax, although the jurisdiction extended to the whole province.

The next branch of our enquiry is to ascertain how these powers were exercised. At the first meeting of Council on July 14th, 1749, his Excellency and the Councillors took and subscribed the following oath, which is termed on the record of the Council, "An Oath for the Impartial Administration of Justice"—"I , do swear that as a member of the Supreme Court of Jurisdiction, I will always give my judgment impartially, and to the utmost of my skill and knowledge according to justice, right and equity, so help me God."

Such was the first Court of Judicature in this province, the powers of which were exercised by the Governor-in-Council under the title of the "General Court." Of the

gentlemen who composed this Court, some were eminent in the early settlement of the province, but, so far as my enquiries have gone, I have not found that any of them were trained lawyers except Duport.

Having assumed the functions of a tribunal of Civil and Criminal Jurisdiction, they were soon called upon to act. The first trial which took place before the Court was that of Peter Cartell for murder. On the 28th August, 1749, at a meeting of the Council, his Excellency read to the Council that article of His Majesty's Instructions relating to the general Court, and proposed that the same be held as soon as possible for the trial of all persons in custody, and particularly Peter Cartell for the murder of Abraham Goodside on the 26th inst. Ordered that the Secretary publish an advertisement that the General Court will assemble on Thursday morning at ten o'clock at the Storehouse to try and determine all causes, civil or criminal, that shall be brought before them.

Ordered that the Provost Marshall be required to summon twelve from each quarter of the town of Halifax to attend the General Court as jurymen.

As this was a trial of some importance and the first one in our annals, I give some further details taken from Murdoch's History, Volume II., page 156. He says: "One Peter Cartell had killed Abraham Goodside, the boatswain's mate of the 'Beaufort' by stabbing him, and had also wounded two other men. The Governor-in-Council sat as a General Court to try him. On 31st August, O. S., a grand jury found a bill against him, a petit jury found him guilty of murder and he was hanged under warrant from the Governor, 13th September, 1749. There was a tradition that a large tree was used instead of a gallows in the earliest years of Halifax. This unhappy child of the forest stood near the market square."

Governor Cornwallis in a letter to the Duke of Bedford, dated 11th Sept., 1749, says: "A general Court was held the 31st August in one of the storehouses for the trial of

one Peter Cartell for murder. The Saturday before he had stabbed the boatswain's mate of the 'Beaufort,' who died upon the spot, and wounded two men that endeavoured to seize him. I enclose an account of the trial, having endeavoured to keep as near the English custom as possible." Archives, page 587.

The Lords of Trade in acknowledging this letter, 16th Oct., 1749, say: "Your method of proceeding in the trial of Peter Cartell for murder was very regular and proper, and will have a good effect, as it will convince the settlers of the intention of conforming to the laws and constitution of the mother country in every point."

This trial, as stated by Cornwallis, appears to have been conducted in accordance with English law and to have proceeded on the well-known principle that the colonists take with them so much of the common law of England as is suitable to their condition and circumstances. Up to this date no laws or ordinances appear to have been enacted or made by the Governor and Council.

I append hereto the indictment in this case, which minutely follows the old form then used in such matters:

THE KING
against
PETER CARTELL.

The Town of Halifax in Nova Scotia, to witt,

The Jurors for the Lord our King upon their oath do present that Peter Cartell of sd. town of Halifax, settler, not having the fear of God before his eyes, but moved and seduced by the Instigation of the Devil on the twenty-sixth day of August and in the twenty-third year of the reign of the sd. Lord the King about five of the clock in the afternoon of the same day at Halifax afforsd. with Force and Arms in and upon one Abraham Goodsides, mariner in the Peace of God and of the Lord our King then and there being, made an assault and most traytorously, feloniously and voluntarily and of his malice forethought, struck and

wounded the said Abraham Goodsides at Halifax aforsd. with a knife the value of twopence, which the said Peter Cartell then and there had and held in his hand and feloniously and of his malice forethought gave the sd. Abraham Goodsides one mortal wound with the knife aforsd, and upon the left side under the lays of the Depth of four inches and of the Breadth of one inch, of which said mortal wound the sd. Abraham Goodsides instantly dyed, and so the said jurors and on their oath say that the said Peter Cartell the Day and Year aforsd. the said Abraham Goodsides in manner and form aforsd. of forethought malice most traytorously, feloniously and voluntarily killed and murdered against the Peace, Crown and Dignity of our Sovereign Lord the King and contrary to the statute in that case made and provided. In witness whereof the sd. jurors have hereunto sett their hands this thirty-first day of August in the Year of our Lord one thousand seven hundred and forty-nine.

Jos. Fairbanks,	John Aubony,
Jn. Clark,	William Jeffray,
John Steinfort,	R. Reeves,
Henry Windell,	John Endy,
L. Hays,	G. Davis,
G. Hicks,	Tho. Rust,
Richd. Catherwood,	Bn. Gerrish,
Chas. Maxwell,	Thos. Lewis,

Geo. Nagel.

From the correctness with which it was drawn and the regularity of the Court proceedings it seems the Court must have been under the guidance of a lawyer.

On Sept. 6th, 1749, the first civil action came before the Council. Elijah Davis petitioned for satisfaction from Ephriam Cook, Master of the "Baltimore," for damages done to his schooner by said Cook, who cut off the bowsprit when by accident his schooner was foul of his, Cook's, ship. The witnesses on both sides were heard, when from the record it appears the Court were fairly at a loss how to decide from their ignorance of nautical terms. They suggested that the

dispute be referred to two ship masters, who, in event of disagreement were to appoint an umpire whose decision was to be final. This was agreed to and an award was made against Cook. As Cook refused to comply with the decision, the matter was again brought before the Court, who ordered that Cook be summoned immediately to answer for want of respect and contempt. Cook attended and alleged that he had no thought of any contempt, but that he could not answer it to his owner if he paid the money without being distrained. Thereupon it was ordered that a warrant be issued to the Sheriff for execution of the award and order, and further resolved that E. Cook ought to ask pardon of his Excellency for having treated his order disrespectfully, and that he acknowledge his fault in writing. "Till he has so done be he ordered not to set his foot on the shore."

Following this, on Nov. 14th, 1749, we have the first action concerning real estate in which Beardsley Glazier claimed that Samuel Shipton had taken possession of lot No. 25 which had been granted to the complainant, and had built a house on it. Shipton, being summoned, complained that Mr. Brewse, the Engineer who had the laying out of the lots, had given him the choice of lot 25 or No. 3; that he had given up No. 3 to Mr. Crosby. The register being sent for, it appeared that Shipton's name had been erased out of No. 3 and Crosby's inserted. This the Council forbade being done, and that the transfer were only to be made by deed. The parties in the meantime settled the dispute by Shipton giving up the lot to Glazier, and Glazier agreeing to give Shipton materials of all kinds equal to those he had put in the house he had built on Glazier's lot.

At a meeting of Council on the 20th Nov., 1749, comes the sequel. Samuel Shipton now petitions to have lot No. 3 on which he had built before he built on No. 25 and given to Crosby, to be restored to him. He asserts that he never entirely abandoned No. 3 to Crosby, but only on condition that he should be established on No. 25. The matter being heard before the Council, Crosby denied the condition, and produced several witnesses in support of his contention that

there was no such condition. Shipton being called on for his testimony in support of his case, said the only person present was his wife, and desired that she might be heard, which was agreed to. She was heard and corroborated her husband as to the condition. The following is the judgment of the Court. "It is the unanimous opinion of the Council that Mr. Shipton has produced no sufficient proof of the agreement being conditional. On the contrary, from the evidence examined, the strongest presumption appeared that Mr. Shipton had entirely relinquished the lot No. 3 to Mr. Crosby, and therefore the Council do adjudge the said lot No. 3 to Mr. Crosby."

I have given these three instances of the exercise of jurisdiction by the General Court in Criminal and Civil matters to show the extent of it, and the methods of procedure adopted, perhaps, in some respects, rather arbitrary and irregular, but on the whole justice and equity prevailed, and law and order was maintained in the infant settlement.

From an entry in the Council Records dated Nov. 20th, 1749, it is evident that among the settlers there must have been some hard characters. The record says: "The Council, being informed that there had been for some time several prisoners in jail for crimes alleged against them, resolved to hold a General Court on Tuesday the 28th inst." It was also resolved that the General Court be held every year, one on the last Tuesday of April, and one on the last Tuesday of October. This was the beginning of regular sessions of the Court, and it is worth noticing that we have retained up to the present day the same periods for the sittings of the Supreme Court in Halifax.

On December 27th, 1749, I find another instance of the sitting of this Court for the trial of crimes: "The Council being informed that the prisoners in jail for killing cattle upon Cornwallis Island had petitioned for their trial, resolved that a General Court be held on Thursday, 4th May."

Again, at a meeting of Council 27th May, 1750, we find the following record: "His Excellency laid before the

Council the information he had received from Major Lawrence that he captured one Joseph LeBlanc, who was evidently the principal instrument of the enemy in those parts, who had confessed the whole. His Excellency acquainted the Council that he had a warrant ready to send to Major Lawrence for the immediate execution of Joseph LeBlanc, but desired to know their opinion, which would probably have the greatest effect, a sudden example of justice, or a fair trial before the General Court with the other prisoners now in custody at Minas. Resolved that Joseph LeBlanc (Labrador) and the two men taken in the bay by Hill, Jean Bathreo and Pierre Rembbiro, be brought to their trial before the General Court in the beginning of August next."

On the 30th July, 1750, Resolved to hold a General Court for the trial of the French prisoners and the criminal cases, and that no civil cases be brought before this Court. I have not followed the record to discover the fate of these prisoners, as not especially pertinent to the object of this paper.

On the 21st August, 1750, the Council were called upon to exercise a different jurisdiction, that is to say to issue a writ of Prohibition to the Admiralty Court not to try therein a cause between Groves, Master of the sloop "Sally," and one Hurd, a factor of Mr. Thomas Gunter of Boston. Hurd contended that Groves had not fulfilled his contract which was made within the body of a county, and so ought to be tried before the General Court and not in the Admiralty. Counsel being heard for both parties, the Council were unanimously of the opinion that upon the face of the libel no reason appears as a sufficient ground for granting a prohibition.

From this it is evident that the Court of Vice-Admiralty must have been constituted very shortly after Cornwallis arrived, but as no record of the fact is to be found in the minutes of Council, I assume such jurisdiction was either exercised directly under an Imperial Commission, or that the Governor by virtue of his commission as Vice-Admiral

appointed the Judge as his delegate. I find on reference to the oldest Admiralty Record Book now in the archives, that the Hon. Edward How was the first Judge of the Court of Vice-Admiralty, that Charles Morris was Registrar, and William Chapman, Marshall. Benjamin Green was Surrogate Judge appointed by How, and Hinchelwood was one of the Proctors. Subsequently Green became Judge. The first recorded case is one by Michael Henley v. Ephriam Cook, tried October, 5th, 1749, four months after the settlement of Halifax.

That the Admiralty Court was not idle is shown by an entry of Oct. 11th, 1750, as follows: "Advised that Otis Little, Esq., acting as King's Attorney, be directed to examine the depositions taken relating to the French brig lately brought into this port by His Majesty's ship "Albany," and make report what proceedings relating to the said Brigt. are legal and regular according to the treaties subsisting between the Crowns of Great Britain and France, and British Act of Parliament. On Oct. 15th, 1750, Otis Little makes a report to the Council, and it was directed that the Brigt. be proceeded against in the Court of Vice-Admiralty for breach of the acts of Trade.

On the 15th May, 1750, we find the Council called upon to act judicially in another capacity, that is to say as a Court of Marriage and Divorce. Lieut. William Williams complained that his wife had been guilty of adultery, and prayed that she might be brought to trial, and if his allegations were made good, to grant him a divorce. The question was put whether the Council could try such cases as properly belonging to the Spiritual Courts. It was declared in the affirmative. The parties with a number of witnesses were heard before the Court and the wife found guilty. The divorce was unanimously granted. The Secretary was ordered to have an instrument of divorce drawn up by persons conversant in the Spiritual Court by which Lieut. Williams shall be at liberty to remarry, but Amy Williams should not have power during the said William's life. The said Amy Williams was further ordered to quit the province within ten

days. The mode in which the Court sitting as a Court of Marriage and Divorce exercised their powers on this occasion was subsequently disapproved of by the Home authorities as not conformable to English law and practice then prevailing.

There are numerous other instances of trials before the General Court in all kinds of cases, both criminal and civil, which it would not be useful to notice at any greater length. The foregoing have been given as illustrations of the proceedings in the early judicial annals of the Province to indicate the mode in which the Courts wielded their authority and the extent of the jurisdiction they assumed. Those who may be curious on the subject will find many others, and some quite interesting, recorded at length in the early record books of the General Court now preserved in the archives.

The chief ministerial officer of the Court at this period was styled Provost Marshal, and not High Sheriff as now. He executed by himself and his deputies all processes and orders of the Courts not only in Halifax, but all over the Province, and continued to do so until an Act of the Legislature was passed in 1778, assented to in 1780, abolishing his office and providing for the appointment of sheriffs in each of the counties. From the proceedings of the House of Assembly, I gather that there was great oppression and possibly extortion in the exercise of the office which led to loud complaints. The British authorities, however, listened to the petition of the Provost Marshal Fenton, and would not allow the Act until a pension was provided for him out of the Provincial revenues. Chapter II., Statutes of 1778, in the preamble, explains the reason for the change from Provost Marshal to Sheriffs.

At the first institution of the Courts the officer now known as Prothonotary and clerk of the Crown was styled the Chief Clerk. I have not ascertained precisely when the change in title was made, possibly after Chief Justice Belcher was appointed. The title is peculiar to Nova Scotia, as I do not find among the other English speaking provinces

that it has been adopted, and it was no doubt so changed to correspond with similar title given to the Chief Clerks in the Courts of the King's Bench and Common Pleas in England. A Mr. Thompson enjoyed the emoluments of the office and resided in England. His duties were performed by Mr. Nutting as deputy. On the death of Thompson, Mr. Nutting succeeded to his place, and at that time and until a comparatively modern date all the country Prothonotaries were simply his deputies.

This was not changed until the year 1853, when an Act was passed by which "the office of Prothonotary of the Supreme Court," and also the office of Clerk of the Crown for the *whole province* was abolished and the Governor-in-Council was authorized to appoint a Prothonotary and Clerk of the Crown for each county in the province, but reserving a certain proportion of the fees for Mr. Nutting, who held his office under letters patent. This reservation of course ceased at his death, and all the Prothonotaries and Clerks of the Crown are entitled to retain all fees of office.

From what has already been said, it has been shewn that at the first settlement of the province the Governor and Council were the supreme legal tribunals, and further held both legislative and executive authority. That among their first acts was one to qualify themselves for their functions by taking the appointed oaths of office, and subsequently entering upon their duties by trying such civil and criminal cases as came before them, and further that they conducted their proceedings on the basis of English law and precedent. But, in the nature of things, it was impossible in view of other important business they could continue to transact all the judicial affairs arising in the Colony. I have already mentioned the names of several persons who were commissioned as Justices of the Peace. Their authority at that time was similar to that belonging to the office in England, and did not extend, as in later times, to the trial of civil causes or actions for the collection of debts not exceeding a specified sum. It may be well to mention here that Justices' civil jurisdiction was first conferred by Act of the

Legislature 14 & 15 Geo. III. cap. 15, Acts of 1774, and has since been extended largely.

On the 6th December, 1749, the Council first turned their attention to the subject of laws for the Province and for regulations for the General Court and County or Inferior Courts. Messrs. Green, Salisbury and Davidson were named as a committee to examine the laws of the Plantations and the regulations with regard to them and report. On the 13th December they presented the result, which was read before the Council. The record says: "The report being read accordingly, was approved by the Council, nem. con., and ordered to be entered in the Council books immediately after the 9 articles of His Majesty's instructions relating to the Courts of Justice, which, by article 82, are ordered to be made public, and registered in the Council books."

His Majesty's instructions so ordered to be registered are of considerable length. The following is the report:

"The Committee are of opinion that the form of Government in Virginia, being the nearest to that of Nova Scotia, the regulations there established for the General Court and their County Courts will be the most proper to be observed in the province. The Committee have therefore collected from the laws of Virginia the following regulations with regard to the General Court and the County Courts, and the forms to be observed therein.

THE GENERAL COURT.

Article 1st. For the more easie and regular Prosecution and Determination of suits and actions in the General Court, the Committee humbly propose that it be established and declared that all Original Process (either by writ, summons, or other means to bring any person to answer any action, information, bill or plaint in the General Court, and all executions and all attachments awarded by the General Court, subpœnas and all other process whatever belonging to any matter prosecuted in the General Court be issued from the Secretary's office signed by the Clerk of the Court and also be returned unto the same office.

2. That no person shall take original process for the trial of any suit in the General Court of less value than ten pounds sterling on penalty of having such suit dismist and paying costs.

3. That no member of His Majesty's Council of this province be sued in an Inferior Court, but that all actions against them shall take their risk and be prosecuted before the General Court, and the process be the same as in Virginia.

4. That all Process whatever returnable to the General Court be executed at least ten days before the day mentioned therein for the Return.

5. That Criminal causes be tried the first day of the sitting of the General Court, and no writs be returnable that day.

6. That on the commitment of any person for any capital or criminal offence, the Magistrate making such commitment shall cause all the witnesses of the fact that shall come to his knowledge to enter into Recognisance of their appearance to give evidence viva voce upon the trial of such offender, all which Recognisance to be delivered to the Clerk three days before the Court sits.

7. That the Clerk of the General Court shall not issue writs, subpoenas or other original Process for more than twelve actions returnable to any one day of the General Court, neither shall he issue such Process returnable to any, unless they shall have theretofore issued Process for twelve suits returnable to every proceeding day of that General Court.

8. That if upon issuing of a Writ to the Provost Marshal for attaching the body of any person to answer to any suit, if the Provost Marshal shall return bail taken for his appearance and such person fail to appear, then judgment shall be given against the Bail, and if the Provost Marshal shall not return good Bail and the Defendant shall fail to appear, then Judgment shall be given against the Provost Marshal. Provided always that the Bail or the Provost Marshal have liberty to make the same Defence that the

Principal defendant might have had. And provided likewise that upon the motion of the Bail or Provost Marshal, it be a rule of the Court to order an attachment to issue against so much of the estate of the Defendant as shall be of value sufficient to satisfy such judgment and all costs and charges.

9. That in all cases where witnesses are to appear at the General Court, a summons be issued for the same by the Clerk of said Court, especially mentioning the time and place where the witnesses are to appear and the names of the parties to the suit wherein they are to give evidence and at whose request they are summoned.

10. That a person failing to appear on such summons be fined in five pounds sterling.

11. That if it appear by certificate from a Justice of the Peace that a Witness is incapable of appearing by reason of age, sickness or other lawful Disability, in this case the Court shall commission one or more persons to take such Person's affidavit. Provided always that such commission be made known to the other party.

12. That if any person summoned as a witness upon appearance before the General Court or before persons appointed (as above) to take affidavits, shall refuse to give evidence upon oath, that such person be immediately committed to the Common Goal there to remain without bail or mainprise until willing to give evidence upon oath.

13. That no writ of any kind be served against any person summoned as a witness during his attendance thereupon, or in the time of his going to or returning from such attendance.

14. That Appeals from the County Court be heard the third day of sitting.

15. That upon an appeal in any personal action, if the sentence appealed from affirmed in the General Court, then the appellant shall besides the principal sum expressed in the sentence, pay for the use Poor a Fine not exceeding 15 per cent. upon the principal sum and costs according as the

Court shall think fit, and upon appeals in real actions, instead of 15 per cent. where the sentence appealed from is affirmed, the applicant shall pay the Poor a sum not exceeding ten pounds sterling.

That for the more easie and regular prosecution of all cases in the General Court, and for the more exact entering of the Judgments of the Court and for the preservation of the Records thereof, the following Rules be observed:

Rule 1. That every Plaintiff shall file his Declaration three days before the day whereto the Writ is returnable. If no declaration is filed before that time, but yet be filed before the day of the Return, the Defendant shall of course have one day more than could otherwise have been allowed, and if no Declaration is filed before the day of the return, then the plaintiff shall be nonsuit.

2. If the plaintiff fails to appear and prosecute the suit he shall be nonsuit.

3. That the Defendant prepare his Plea in writing to the Declaration of the Plaintiff.

4. That the Clerk carefully preserve the Declaration, Pleas, and all other Papers, and that they be all filed together in the office.

5. That in all cases where the title of any estate in Land is determined, the pleadings shall be all in writing and shall be entered at large with the Judgment thereupon in particular Books set apart for that purpose only.

6. That all proceedings in Pleas of the Crown Criminal cases and matters relating to the Public Revenues be recorded in Particular Books set apart for that purpose.

7. That for the more regular Prosecution of cases Two or more Attorneys be appointed, sworn and their fees regulated.

8. That every person be allowed to speak himself in his own cause, or produce one to speak for him, or desire the Court to name one.

9. That no person take any fee or gratuity whatever for speaking in any cause.

THE COUNTY COURT.

The Committee humbly proposes that there be established a County Court consisting of five or more Justices by Commission from His Excellency under the seal of the Province any thereof which Justices shall be sufficient to hear and determine all causes which shall belong to such County Court.

That the Justice of the County Court have full power, authority and jurisdiction to hear and determine all causes whatsoever cognizable at Common Law or, except such criminal causes wherein the judgment upon conviction shall be for the Loss of Life or member and except the prosecution of causes to Out-Lawry against any person, and also except all causes of less value than twenty shillings be declared cognizable and finally determinable by one Justice of the said County Court.

That the County Court be held monthly the first Tuesday of every month, and do sit from day to day till all causes that come before them are determined.

That the first Justice in the Commission be authorised to call special Court when he thinks necessary for the sake of merchants and others from distant places, whose stay might be very prejudicial to their affairs.

That all original Process and writs of all kinds to bring Persons to answer any suit or action in the County Court, and all executions and attachments awarded by the said Court, shall be issued by the Clerk of the Court, and shall be again returned to the same office whence they were issued.

That for the more regular granting of appeals from the County Court, it be declared that when any person prays an appeal to the General Court such person before such appeal be granted shall give Bond with good and sufficient security for the prosecuting the same with effect, and to perform the judgment of the General Court and to pay Damages if the judgment of the County Court shall be affirmed, in manner following, to wit, in all personal and mixt actions the damages, fifteen per cent. upon the Principal sum and costs

ordered to be paid by the judgment of the County Court, and in every Relation the damage shall be ten pounds over and above all costs and damages ordered to be paid by the judgment of the County Court.

That no appeal be granted from County Court to the General Court for any sum less than five pounds sterling.

That all the Regulations and Rules of Court be the same in County Court with those formerly mentioned in the General Court. The following rules to respect both the General Court and the County Court.

That if any difficulty shall arise in explaining any of the above rules and regulations that Recourse be had for explanation to the Laws of Virginia, whence most of them are derived, particularly an Act entitled An Act for establishing the General Court, pp. 251 to 260, and an Act entitled An Act establishing County Courts, p. 332 to p. 338."

EXTRACT FROM ROYAL INSTRUCTIONS TO PEREGRINE THOMAS HOPSON, CAPTAIN-GENERAL AND GOVERNOR, DATED MAY 7TH, 1752.

Manuscript Documents, No. 348.

AND WHEREAS for the Peace, Happiness and Security of all His Majesty's Subjects within the said Province, and for the more speedy and easy execution of Justice and Determination of all controversies and differences, it is necessary that Courts of Judicature and publick Justice should be erected, and also a Judge, or Assistant Justice of the Peace, Sheriffs and other officers should be appointed according to the Powers and Directions of His Majesty's Commission and these Instructions; It is therefore His Majesty's Will and Pleasure, that one principal Court of Judicature should be held twice a year or oftener as you shall judge expedient by the Name of the General Court, and to have Jurisdiction of all causes Real and Personal at common law above the value of five pounds, to act as a Court of Chancery, but not without appeal to His Majesty when the matter in Question shall exceed three hundred Pound Sterling, as also to try all criminal cases that may come before the said General Court, which

said Court, It is His further Will and Pleasure should consist of the Governor or Commander-in-Chief and the Council of the said Province for the time being, any five whereof to be a quorum.

AND IT IS HIS MAJESTY'S FURTHER WILL AND PLEASURE, and you are hereby authorized and required to constitute and appoint such and so many inferior courts of Judicature and Justice within the said Province as you by and with the advice and consent of the said Council shall judge most proper, as also Judges, Justices of the Peace, Sheriffs and other Officers and Ministers of Justice; taking care that you do administer or cause to be administered to all and every such Person as are usually given for the due execution of Offices and Places, and the impartial administration of Justice, and in the choice and nomination of said Judges, Justices, Sheriffs and other Officers; you are always to take care that they be of good life and well affected to His Majesty's Government, and of good Estates and abilities and not necessitous Persons.

AND you are to transmit to His Majesty's Commissioners for Trade and Plantations with all convenient speed a particular account of all establishments of Jurisdictions, Courts, Offices, and Officers, Powers, Authoritys, Fees and Privileges granted and settled within the said Province; as likewise an account of all publick Charges relating to the said Courts and of such Funds as are settled and appropriated to discharge the same; together with exact and authentic copies of all Proceedings in such Causes where appeals shall be made to His Majesty in His Privy Council.

You shall not displace any of the Judges, Justices, Sheriffs or other Officers or Ministers within the said Province already appointed, without good and sufficient cause so signified unto His Majesty's Commisioners for Trade and Plantations; and to prevent arbitrary Removals of the Judges and Justices of the Peace, you are not to express any limitation of time in the Commissions, which you are to grant to Persons fit for those Employments, nor shall you execute by yourself or by Deputy any of the said Offices.

AND you are with the advice and consent of the Council to take especial care to regulate all salaries and Fees belonging to Places or paid upon Emergencies that they be within the Bounds of Moderation, and that no exactions be made on any occasion whatsoever; as also that Tables of all Fees be publickly hung up in all Places where such Fees are to be paid, and you are to transmit copies of all such Tables of Fees to His Majesty's Commissioners for Trade and Plantations, as aforesaid.

AND whereas frequent complaints have been made of great Delays and undue Proceedings in the Courts of Justice in several of the Plantations, whereby many of His Majesty's subjects have very much suffer'd, and it being of the greatest importance to His Majesty's Service and to the Welfare of the Plantations, that Justice be everywhere speedily and duly administered, and that all Disorders, Delays and other undue Practices in the administration thereof be effectually prevented; You are particularly required to take especial care that in all Courts where you are authorized to preside, Justice be impartially administered, and that in all other Courts established within the said Province all Judges and other Persons therein concerned do likewise perform their several Duties without Delay or Partiality.

YOU are to take care that no Court of Judicature be adjourned but upon good grounds; as also that no Orders of any Court of Judicature be entered or allowed which shall not be first read and approved of by the Magistrates in open Court, which Rule you are in like manner to see observed with Relation to the Proceedings of the said Council, and that all orders there made be first read and approved in Council before they are enter'd upon the Council Books.

WHEREAS His Majesty is above all things desirous that all His subjects may enjoy their legal Rights and Properties, you are to take especial care that if any Person be committed for any criminal matters (unless for Treason or Felony plainly and especially express'd in the Warrant of Commitment) he have free Liberty to petition by himself or otherwise for a writ of Habeas Corpus, which upon such application shall be

granted and served on the Provost Marshal, Gaoler or other Officer having the custody of such Prisoner, or shall be left at the Gaol or Place where such Prisoner is confined, And the said Provost Marshal or other Officer shall within three days after such service (on the Petitioner's paying the Fees and Charges, and giving security that he will not escape by the way) make return of the Writ and Prisoner before the Judge who granted out the said Writ, and there certify the true cause of the Imprisonment, and the said Judge shall discharge such Prisoner, taking his Recognizance and Security for his appearance at the Court where the offence is cognizable, and certify the said Writ & Recognizance into the Court, unless such offences appear to the said Judge not bailable by the laws of England.

AND in case the said Judge shall refuse to grant a Writ of Habeas Corpus, on view of the copy of commitment, or upon Oath made of such Copy having been denied the Prisoner, or any Person requiring the same in his behalf, or shall delay to discharge the Prisoner, after the granting of such Writ, the said Judge shall incur the Forfeiture of his Place.

YOU are likewise to declare His Majesty's pleasure that in case the Provost Marshal or other officer shall imprison any person above twelve Hours, except by a mittimus setting forth the Cause thereof, he be removed from his said Office.

AND upon the application of any Person wrongfully committed the Judge shall issue his Warrant to the Provost Marshal or other Officer to bring the Prisoner before him, who shall be discharged without Bail or paying Fees, and the Provost Marshal or other Officer refusing Obedience to such Warrant shall be thereupon removed; and if the said Judge denies his warrant, he shall likewise incur the Forfeiture of his Place.

YOU shall give directions that no Prisoner being set at large by an Habeas Corpus be recommitted for the same Offence, but by the Court where he is bound to appear, and if any Judge, Provost Marshal or other Officer contrary hereunto shall re-commit such Person so bail'd or deliver'd, You

are to remove him from his Place; and if the Provost Marshal or other Officer having the Custody of the Prisoner neglects to return the Habeas Corpus or refuses a copy of the Committment within six Hours after Demand made by the Prisoner or any other in his behalf, he shall likewise incur the Forfeiture of his Place.

YOU are to take care that all Prisoners in cases of Treason or Felony have free Liberty to petition in open Court for their Tryals, that they be indicted at the first Court of Oyer and Terminer, unless it appears upon oath that the witnesses against them could not be produced and that they be tryed at the second Court or discharged, and the Judge, upon motion made the last Day of the Sessions in open Court shall discharge the Prisoner accordingly, and upon the refusal of the said Judge and Provost Marshal or other Officer to do their respective Dutys herein they shall be removed from their places.

PROVIDED always that no Person be discharged out of Prison who stands committed for Debt by any Decree of Chancery or any legal Proceedings of any Court of Record.

AND for the Preventing of any Exactions that may be made upon Prisoners, you are to declare His Majesty's Pleasure that no Judge shall receive for himself or Clerks for granting a Writ of Habeas Corpus more than two shillings and sixpence, and the like sum for taking a recognizance; and that the Provost Marshal or other Officer shall not receive more than five shillings for every committment, one shilling and three pence for the Bond the Prisoner is to sign, one shilling three pence for every copy of a Mittimus and one shilling and three pence for every mile he bringeth back the Prisoner.

AND further, you are to cause this His Majesty's Royal Pleasure signified to you by the Nine Articles of Instructions immediately preceding this, to be made publick and registered in the Council Books of the said Province.

YOU are to take care that no man's Life, Member, Freehold or Goods be taken away or harmed in the said Province

under your Government, otherwise than by established and known Laws, not repugnant to, but as near as may be agreeable to the Laws of this Kingdom, and that no Persons be sent as Prisoners to this Kingdom from the said Province without sufficient Proof of their Crimes, and that Proof transmitted along with the said Prisoners.

YOU are to take care that all Writs within the said Province be issued in His Majesty's name.

YOU shall take care with the advice and assistance of the Council that proper Prisons be forthwith erected and put into and kept in such a condition as may sufficiently secure the Prisoners that are or shall be there in Custody.

WHEREAS Appeals ought to be made in cases of error from the respective Courts in the said Province unto you and the Council there in General Court, and in your absence from the said Province to the Lieutenant-Governor or to the Commander-in-Chief for the time being, and the said Council in civil causes, if either party shall not rest satisfied with the Judgment of you or the Commander-in-Chief for the time being and Council as aforesaid, His Majesty's Will and Pleasure is that they may then appeal unto His Majesty in His Privy Council; Provided the Sum or Value so appealed for unto His Majesty do exceed three hundred Pounds sterling, and that such Appeal be made within fourteen days after Sentence and good security be given by the Appellant that he will effectually prosecute the same and answer the condemnation, as also pay such Cost and Damages as shall be awarded by His Majesty in case the sentence of you or the Commander-in-Chief for the time being and Council be affirmed; And it is His Majesty's further Will and Pleasure that in all cases where by your instructions you are to admit Appeals to His Majesty in His Privy Council, execution be suspended until the final determination of such Appeal, unless good and sufficient Security be given by the Appellee to make ample Restitution of all that the Appellant shall have lost by means of such Judgment or Decree in case upon the Determination of such Appeal such Judgment or Decree should be reversed and Restitution awarded to the Appellant.

EXTRACT FROM ADDITIONAL INSTRUCTIONS TO GOVERNOR HOPSON, 18TH DECEMBER, 1753.

Manuscript Document No. 348.

George R.

ADDITIONAL INSTRUCTION to our Trusty and Well-beloved Peregrine Thomas Hopson, Esquire, our Captain-General and Governor-in-Chief in and over Our Province of Nova Scotia or Acadie in America, or to the Commander-in-Chief of our said province for the time being. Given at Our Court at St. James's the 18th day of December, 1753, in the Twenty-seventh year of Our Reign.

WHEREAS it hath been represented unto us, that the Method prescribed by the Instructions heretofore given by Us to the Governors of Our ..... and Plantations in America, relative to appeals from the Courts there in Cases of Error, has, by subsequent Regulations which have been from time to time made by Us in Our Privy Council relative to such Appeals, become defective and improper, For Remedy thereof for the future, IT IS OUR ROYAL WILL AND PLEASURE that you or the Commander-in-Chief of Our Province of Nova Scotia for the time being do permit and allow appeals from any of the Courts of Common Law in Our said Province unto you or the Commander-in-Chief and the Council of Our said Province; and you are for that purpose to issue a Writ in the manner which has been usually accustomed, returnable before yourself and the Council of Our said Province who are to proceed to hear and determine such Appeal, wherein such of Our said Court.... .....shall be at that time Judges of the Court ..... such Appeal shall be so made to you our Captain-General or to the Commander-in-Chief for the time being and to Our said Council as aforesaid, shall not be admitted to vote upon the said Appeal; but they may be nevertheless be present at the hearing thereof, to give the reasons of the Judgment given by them in the Causes wherein such Appeals shall be made; PROVIDED, nevertheless, that in all such Appeals

the sum or value appealed for do exceed the sum of three hundred pounds sterling, and that security be first duly given by the Appellant to answer such Charges as shall be awarded, in case the first sentence is affirmed. And if either party shall not rest satisfied with the judgment of you or the Commander-in-Chief for the time being and of Our Council as aforesaid, Our Will and Pleasure is that such Party may then appeal unto Us in Our Privy Council. Provided the sum or value so appealed for unto Us do exceed five hundred pounds sterling, and that such Appeal be made within fourteen days after Sentence, and good security given by the Appellant that he will effectually prosecute the same and answer the condemnation, and also pay such Costs and Damages as shall be awarded by Us in case the sentence of you or the Commander-in-Chief for the time being and of Our Council be affirmed; PROVIDED, nevertheless, that where the matter in question relates to the taking or demanding of Duty payable to us or to any Fee of Office, or annual Rent, or other such like matter or thing where the rights in future may be bound, in all such cases you are to admit an Appeal to Us in Our Privy Council, altho' the immediate sum or value appealed for be of less value. And it is our further Will and Pleasure that in all Cases where by your Instructions you are to admit Appeals to Us in Our Privy Council, execution be suspended, until the final Determination of such Appeals, unless good and sufficient security be given by the Appellee to make ample Restitution of all that the Appellant shall have lost by means of such Judgment or Decree, in case, upon the Determination of such Appeal, such Decree or Judgment should be reversed and Restitution awarded to the Appellant.

G. R.

It is most important in many ways to know the source of much of our judicial procedure which we thus trace back to the colony of Virginia, at that time under the British crown. The concluding regulation, in fact, provides for the guidance of both the General and County Courts. "That

if any difficulty shall arise in explaining any of the above rules and regulations, that recourse be had for explanation to the Laws of Virginia, whence most of them are derived, particularly an Act entitled An Act for Establishing the General Court, p. 251 to p. 260, and an Act entitled An Act Establishing County Courts, p. 332 to p. 338." It is remarkable that in view of the provision respecting the laws of Virginia, so far as I can ascertain, there is no copy of the Laws of Virginia containing these regulations to be found either in our Legislative or Law Library. I venture to suggest that an effort be made to secure one.

It should however be mentioned that in the Legislative Library there is to be found a very old copy of what purports to be the laws of Virginia, dated 1704, bound in one volume with the laws of several other English colonies. Although it contains some of the regulations adopted by the Governor-in-Council it evidently does not give all which are to be found recorded in the Council Books. I, therefore, assume that they had been added to, and amended, and that the Committee of Council made their report from the later laws of Virginia, not now in the library.

We have now before us a concise statement of the establishment of the two Courts of Judicature which took cognizance of all business, civil and criminal, with the method of procedure adopted, and which, with some changes, continued in force up to the arrival of Chief Justice Belcher, 15 Oct., 1754, some years after the founding of the settlement, that is to say the General Court, and as it was at first styled, the County Court. We know that the Governor and Council formed the General Court, but it is not quite so clear who were first appointed Justices of the County Court, as I do not find any specific appointment in the records in the first instance to this office. I conclude, however, with some degree of certainty, that the jurisdiction was assumed by the gentlemen who were made Justices of the Peace at the meeting of Council, 10th July, 1749. Their names were John Brewse, Robert Ewer, John Collier and John Duport. We find some of these gentlemen subsequently acting in that

capacity. Of their personal history I can find nothing recorded except short biographical notes in Aikins' Nova Scotia Archives of John Collier and John Duport. The Hon. John Collier was a retired officer of the army. He came out with the first British settlers in 1749, and was soon after his arrival appointed by Governor Cornwallis a Justice of the Peace for the new settlement. He was also a captain of militia. He was appointed a member of Counеil 27th January, 1752. He died at Halifax 1769.

John Duport was an attorney. He came out with the settlers in June, 1749, and in July following was appointed a Justice of the Peace. In February, 1752, he was made Judge of the Inferior Court of Common Pleas. He performed the duties of Secretary of the Council for many years. In 1776 he prepared an edition of the laws of the province, which was printed by Richard Fletcher, King's printer in Halifax. Mr. Duport was appointed second assistant Judge of the Supreme Court of St. John's (P. E. Island), and in 1770 was elevated to be Chief Justice of that Island. From incidental references in the correspondence of Lord Cornwallis, I think Brewse was an engineer or surveyor, as he appears to have been engaged in laying out the divisions of the newly founded town. Otis Little, I have already noted, was the King's attorney, or we should speak of him as the Attorney-General for the Province, who I regret to say, was subsequently dismissed for misconduct, and William Nesbitt took his place. On September 29th, 1750, William Nesbitt and Thomas Walker were appointed notaries public.

The next reference to judicial procedure is found in the Council Records, December 20th, 1750, when the Justices memorialized the Governor-in-Council for further regulations to be made in regard to the Courts of Justice and matters relating thereto, and on July 14th, 1751, the Council adopted amended and additional rules and regulations for their guidance. It would be unprofitable to give these in detail, or discuss them at any length. It suffices to say that the Courts even then appear from the records to have had

plenty of occupation. Among other crimes and charges which they were called upon to adjudicate were those of selling and cutting coins and pistareens; selling liquor without license; for marrying people without lawful authority; for spreading false news; for violating the Sabbath.

Some of the punishments enumerated somewhat shock our feelings at the present day, although quite in accordance with the laws of England then in force. Several persons were hanged for ordinary thefts. Murderers claimed the benefit of the clergy, and after being branded with a hot iron on the hand were allowed to go free; the pillory for certain offences was then in use; whipping, and that severe, was inflicted for many offences which we regard with a more lenient eye. It is hard to realize that all these modes of punishment were formerly practised in our province.

One case of some peculiarity was the application of Anne Porter for relief in a case where she had an execution in the County and General Courts against one John Hoar, but could not get the fruits of her judgment because he had tendered a house in satisfaction. In another James Parport prays for relief against an award which had been made against him.

I may mention just here, though having no direct relation to my paper, that it appears from the Council records that February 3rd, 1752, the first provision was made for the registration of deeds, the commencement of a system highly beneficial to the province. On May 29, 1752, for some reason unexplained, the title of the County Court was changed, it was afterwards known as the "Inferior Court of Common Pleas," and some of the former Justices were re-appointed. The new appointees were Charles Morris, James Monk, John Duport, Robert Ewer, Joseph Scott, William Bown, Sebastian Zonberluhler, Joseph Gerrish, John Creighton and Edward Crawley to be Justices of the Inferior Court of Common Pleas for the county of Halifax in this province.

The first record we find after the appointment of this new Court is on March 2nd, 1752, a memorial to the Council asking for further rules and regulations. On March 10th

another application respecting amendments of error to be made in copies of writs, and 8th April following forms of capias, summons and attachment, and execution were adopted, all showing that even at that early date in our legal history questions of practice were worrying the judicial mind.

It is curious to note here that although the Justices were appointed so far back as February, 1752, as "Justices of the Inferior Court of Common Pleas," it was not until May 29th, 1752, that the Order in Council was passed making the change of name from the County Court for the county of Halifax to the Inferior Court of Common Pleas for the county of Halifax.

This completed Cornwallis' work so far as the constitution of the Courts and procedure were concerned, as he shortly afterwards resigned, and Peregrine Thomas Hopson, on August 3rd, 1752, was sworn in Governor, and a new Council appointed as follows: Charles Lawrence, Benjamin Green, John Salisbury, William Steele, John Collier, and George Fotheringham, who by virtue of their office became of course Judges of the General Court.

By an entry in the Council Records, October 25th, 1752, appears a memorial by one Francis Martin to allow an appeal from the decision of the Inferior Court which had been refused. The Council in the exercise of their authority directed that the appeal should be allowed.

Up to November 13th, 1752, the General Court appear not to have possessed a seal to authenticate process issued, for we find by an Order in Council one is directed to be made.

In this year, July 9, 1752, proceedings were commenced before the Council against Ephriam Cook, who had made most damaging charges against the integrity of the Justices of the Inferior Court. Mr. Cook was apparently of a very contrary and rebellious disposition, and had before this occasioned much trouble to the authorities. In this instance he was summoned to answer the charges made by the Justices, and from the record it appears his slanders were not well founded, but Mr. Cook was not easily frightened, and

in the first instance excused himself from appearing to answer for his contempt. He was, however, forced to submission ,and made to apologise for his strictures, but he was removed from the commission as a Justice, which he had held till that time.

But this was not the end of attacks on the Justices of the Court of Common Pleas, for we find, December 29th, 1752, their memorial to Council to take under consideration certain aspersions on their characters and conduct as Judges made by no other than David Lloyd, their clerk, as well as a memorial of the merchants and others complaining of partiality and irregularity in their proceedings. All parties were summoned before the Council and were heard at great length, in fact not terminating until 1st March, 1753, when the Council publicly announced their decision in favour of the Justices. It is difficult at this day to form any just opinion on the truth of these assaults on the conduct of our first Judges. The Council examined them with great earnestness and acquitted them. But, on the other hand, the Justices were influential men, some of them members of the Council, and all more or less connected with that body. The whole proceedings are recorded at length and form quite an interesting episode, but too long to discuss further here.

There is one significant record immediately after, on March 5th, 1753, a new commission was issued, including the same Justices and others who were added to their number.

April 21, 1753, a committee of the Council was appointed to collect and print all the laws and ordinances enacted up to that date, and on September 4th, 1753, further rules of Court were adopted, and the acts of the Court in the past confirmed.

On the 19th November, 1753, further forms of procedure were adopted, which are addressed to the Provost Marshal or his deputy, and issued either under the title of the "Inferior Court of Common Pleas, or General Court of Judicature holden at Halifax," shewing that the same two Courts

continued to have jurisdiction in all matters, as indeed, they did until October 21st, 1754, when Jonathan Belcher, on that day, presented his commission from King George, appointing him Chief Justice of the Province of Nova Scotia, and was sworn in. He had previously taken his seat at the Council Board, October 14th, and on the same day Lawrence was sworn in as Governor of the Province. I may mention here that at this time the senior member of the Inferior Court of Common Pleas was styled the first Justice, and enjoyed no other title. As soon as Chief Justice Belcher assumed the duties of his office, the title of the Court was changed, and was afterwards called the Supreme Court, and the General Court consisting of the Governor and Council ceased to exercise further jurisdiction. This appears from the Record books of the Court now in the archives. I can find no Act or regulation of the Council bringing about this change, nor conferring this jurisdiction upon him, and I, therefore, conclude that his authority was contained in his commission as Chief Justice. It is worthy of note as confirming this view, that in several Acts passed in Council after he arrived, the term "Supreme Court" is first used, showing that some authority recognized by the Council must have been conferred upon him.

Belcher held two commissions as Chief Justice of this Province, the first from George II., 1st July, 1754, the second from George III., 14th April, 1761, the mandamus for which last was signed by William Pitt, the great Lord Chatham. As they are both of importance in considering the judiciary of the Province, I give them in full. I also append the mandamus for several commissions to other Chief Justices and Attorneys and Solicitors-General.

MANDAMUS FOR CH. J. BELCHER, FIRST COMMISSION FROM GEORGE II.

George R.

Trusty and well-beloved we greet you well. Whereas we have taken into our Royal Consideration the Integrity and Ability of our Trusty and Well-beloved Jonathan Belcher,

Esquire; we have thought fit hereby to require and authorize you forthwith to cause Letters Patent to pass under our . . . Seal of that our Province of Nova Scotia or Acadia for constituting and appointing the said Jonathan Belcher, Esquire, our Chief Justice of and in our said Province. To have, hold, execute and enjoy the said office unto him the said Jonathan Belcher, for and during our Pleasure, and his Residence within our said Province, together with all and singular the Rights, Profits and Emoluments unto the said Place belonging in the most full and ample manner, together with full power and authority to hold the Supreme Courts of Judicature at such Places and Times as the same may and ought to be held within our said Province. And for so doing this shall be your warrant; and so we bid you farewell.

Given at our Court at Kensington this First day of July, 1754, in the twenty-eighth year of our Reign.

By His Majesty's command,

(Sgd.) T. ROBINSON.

MANDAMUS FOR CH. J. BELCHER, SECOND COMMISSION FROM GEORGE III.

George R.

Trusty and Well-beloved We greet you well. Whereas we have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Well-beloved Jonathan Belcher, Esquire, We have thought fit hereby to authorize and require you forthwith to cause Letters Patent to be passed under Our Seal of Our Province of Nova Scotia in America, for constituting and appointing him, the said Jonathan Belcher, Our Chief Justice of and in Our Province of Nova Scotia; To have, hold, exercise and enjoy the said Office unto him, the said Jonathan Belcher, for and during our pleasure, and his Residence within our said Province, together with all and singular the Rights, Profits, Privileges and Emoluments unto the said Place belonging, in as full and ample manner as he the said Jonathan Belcher, or any

other person have heretofore held and enjoyed, or of right ought to have held and enjoyed the same, with full Power and Authority to hold the Supreme Courts of Judicature at such Places and Times as the same may and ought to be held within our said Province, and you are to cause to be inserted in the said Letters Patent a Clause for revoking and determining the last Letters Patent whereby the said Jonathan Belcher was constituted Chief Justice of Our said Province of Nova Scotia. And for so doing this shall be your warrant and so we bid you farewell. Given at Our Court at St. James's, the Fourteenth day of April, 1761, in the first year of Our Reign.

By His Majesty's command,

(Sgd.) W. Pitt.

This is a convenient place to draw attention to the fact that the commissions to our early Judges were, as in the case of Chief Justice Belcher, "during pleasure only," that is to say, during the pleasure of the Crown, by whose authority alone they were removable. This condition of affairs was changed in 1849, when a bill was brought into the House of Assembly by which the Judges were to be appointed "during good conduct," "quamdiu se bene gesserit" in legal phraseology, and only removable on the joint address of the two Houses of the Legislature. The reason assigned for this change was to make the Judges quite independent of all influences, whether of the Crown, or from any other source. Strange to say this change was bitterly opposed by so eminent a lawyer and Judge as the late Mr. Justice Johnston, but I rather suspect his opposition was due to another result of the law which henceforth left judicial appointments in the hands of the Provincial Government without reference to the Imperial authorities. This I gather from expressions used in the course of the debate on the subject. My impression is confirmed by the fact that the late Mr. Justice Dodd appears to have been the last Judge of the Supreme Court who was appointed in consequence of a mandamus from the home authorities. He was appointed 17th March, 1849, against

the wish of the Provincial Government, composed of Howe, Young and others. The previous Government, of which Judge Dodd was a member, had resigned the February before, and had evidently recommended Dodd for the vacant Judgeship. Now, although the Act first referred to passed at this session, it is not incorporated in the Acts for the year 1849, and I conclude that the Home Government had not at that time assented to it. This is proved by the fact that the late Mr. Justice DesBarres' commission, dated November 14th, 1849, was in exactly the same terms as those of the former Judges, although he was appointed by the Provincial Government.

Another noticeable change was made, that is to say up to the reign of George III. the Judges, both in England and her colonies, on the death of the reigning sovereign required new commissions. This is the reason why Chief Justice Belcher held two commissions. An Act was passed early in the reign of George III., which declared that the office of a Judge should not be vacated on the demise of the sovereign, and, I presume, applied to colonial appointments, thus placing the Judges in a perfectly independent position, the same as occupied at the present day, when they are irremovable except by a vote of the two Houses of Parliament.

MANDAMUS FOR JOHN FENTON'S COMMISSION AS PROVOST MARSHALL.

George R.

Trusty and Well-beloved, We greet you well. Whereas We have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Well-beloved John Fenton, Esquire, We have thought fit hereby to authorize and require you forthwith to cause Letters Patent to be passed under the Seal of Our Province of Nova Scotia, constituting and appointing him the said John Fenton, Provost Marshall of and in Our said Province; To have, hold, exercise and enjoy the said Office or Place unto him the said

John Fenton, by himself or his sufficient Deputy or Deputies (for whom he shall be answerable) for and during Our pleasure, and his Residence within our said Province, together with all and singular the Rights, Salaries, Allowances, Fees, Profits, Privileges and Emoluments thereunto belonging or appertaining, in as full and ample manner as any other Person hath heretofore held and enjoyed, or of Right ought to have held and enjoyed the same. And for so doing this shall be your Warrant. And so we bid you farewell. Given at our Court at St. James's the Seventeenth day of March, 1772, in the Twelfth Year of Our Reign.

By His Majesty's command,

(Sgd.) HILLSBOROUGH.

MANDAMUS FOR JAMES MONK'S COMMISSION AS SOLICITOR-GENERAL.

George R.

Trusty and Well-beloved, We greet you well. Whereas We have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Well-beloved James Monk, Esquire, We have thought fit hereby, to authorize and require you forthwith to cause Letters Patent to be passed under the Seal of Our Province of Nova Scotia, constituting and appointing him the said James Monk, Our Solicitor-General of and in Our said Province; To have, hold, exercise and enjoy the said office unto him the said James Monk, during Our Pleasure, together with all and singular the Rights, Fees, Profits, Privileges and Advantages thereunto belonging, or appertaining, in as full and ample manner as any Solicitor-General of Our said Province hath heretofore held and enjoyed, or of Right ought to have held and enjoyed the same. And you are to cause to be inserted in the said Letters Patent a Clause or Proviso obliging the said James Monk to actual Residence within our said Province, and to execute the said Office in his own Person, except in case of sickness or incapacity, and with all such other clauses and Provisos as are requisite and necessary in this Behalf. And

for so doing this shall be your Warrant. And so we bid you farewell. Given at our Court at St. James's the thirty-first day of July, 1772, in the Twelfth Year of our Reign.

By His Majesty's command,

(Sgd.) HILLSBOROUGH.

MANDAMUS FOR RICHARD JOHN UNIACKE'S COMMISSION AS SOLICITOR-GENERAL.

George R.

Trusty and Wellbeloved, We greet you well. Whereas We have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Wellbeloved Richard John Uniacke, Esquire, We have thought fit hereby to authorize and require you forthwith to cause Letters Patent to be passed under the Seal of our Province of Nova Scotia, constituting and appointing him the said Richard John Uniacke Our Solicitor-General of and in Our said Province in the room of Richard Gibbons, Esquire, whom we have appointed our Attorney-General of Our said Province; To have, hold, exercise and enjoy the said Office unto him the said Richard John Uniacke during Our Pleasure, together with all and singular the Rights, Fees, Profits, Privileges and Advantages thereunto belonging or appertaining in as full and ample manner as any Solicitor-General of Our said Province hath hereto held and enjoyed, or of Right ought to have held and enjoyed the same. And you are to cause to be inserted in the said Letters Patent a clause or proviso obliging the said Richard John Uniacke to actual residence within our said Province, and to execute the said office in his own Person, except in case of sickness or incapacity, and with all such other clauses and provisos as are requisite and necessary in this behalf. And for so doing this shall be you Warrant. And so we bid you farewell. Given at our Court at St. James's the Twenty-eighth day of February, 1782, in the Twenty-second year of Our Reign.

By His Majesty's Command.

(Sgd.) W. ELLIS.

MANDAMUS FOR WILLIAM THOMSON'S COMMISSION AS PROTHONOTARY.

George R.

Right Trusty and Wellbeloved, We greet you well. Whereas we have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Wellbeloved William Thomson, Esqr. We have thought fit hereby to authorize and require you forthwith to cause Letters Patent to be passed under Our Seal of that Our Province of Nova Scotia, constituting and appointing him the said William Thomson, Prothonotary and Clerk of the Crown in our said Province, to have, hold, exercise and enjoy the said office during our Pleasure and his Residence within Our said Province with all and singular the Rights, Salaries, Fees, Profits, Privileges and Emoluments thereunto belonging or appertaining, and for so doing this shall be your Warrant. And so we bid you farewell. Given at Our Court at St. James's the Sixth day of October, 1786, in the Twenty-sixth year of Our Reign.

By His Majesty's Command.

(Sgd.) SYDNEY.

As this concludes that part of my subject relating to the establishment of the early common law courts in this Province, culminating in the constitution of the Supreme Court with Chief Justice Belcher at its head, it is a fitting place to make some reference to that eminent Judge. In the archives Mr. Aikins in a note gives the following brief biographical sketch.

"Jonathan Belcher was a second son of Governor Belcher of Massachusetts. He graduated at Harvard, Cambridge, and was educated for the profession of the law. He afterwards went to England to complete his studies, when he became a member of the Society of the Middle Temple. He received the appointment of Chief Justice of Nova Scotia in 1754. Soon after assuming that office, he urged upon the Government the necessity of calling a representative assembly, being of opinion that the Governor and Council

under the Governor's commission and instructions did not possess the power of levying taxes. The earliest enactments of the Legislature which form the groundwork of the Statute Law of Nova Scotia were prepared by him. Chief Justice Belcher was President of Council, and administered the government of the Province on the death of Governor Lawrence in October, 1760. He died in Halifax, 1776, aged 65, leaving a son and daughter. The House of Assembly allowed a pension to his daughter until her marriage. His son, the Hon. Andrew Belcher, was for several years a member of the Council. He was father of Vice-Admiral Sir Edward Belcher, distinguished for his nautical surveys on the Coast of Africa and the Arctic seas. Sir Edward was born at Halifax and educated at the old Grammar School on Barrington Street under the Rev. George Wright."

It may be interesting to add the following description from Murdoch's History of the inaugural proceedings on Chief Justice Belcher's first presiding in the Court: "On Monday, 14th October, Jonathan Belcher, the newly appointed Chief Justice of the Province, was (by H. M. Mandamus) sworn in as a member of the Council, after which the Council adjourned to the Court House, where after proclamation made for silence, the King's commission appointing Charles Lawrence Lieutenant-Governor was read in public. He was sworn in and took the chair. The Council addressed him in congratulation, and he made a suitable reply. A commission by letters patent for the Chief Justice was prepared, and on the 21st October (Monday) it was read in Council, and the Chief Justice took the usual oaths of office. On the first day of Michaelmas term the Chief Justice walked in procession from the Governor's house to the Pontac—a tavern. He was accompanied by the Lt.-Governor Lawrence, the members of the Council, and the gentlemen of the bar in their robes. They were preceded by the Provost Marshal, the Judges' tipstaff and the civil officers. At the long room of the Pontac an elegant breakfast was provided. The Chief Justice in his scarlet robe was there received and complimented in the 'politest manner' by a great number

of gentlemen and ladies and officers of the army. Breakfast being over, they proceeded with the commission carried before them to the church (St. Paul's), where the Rev. Mr. Breynton preached from this text: "I am one of these that are peaceable and faithful in Israel." A suitable anthem was sung. After this they proceeded to the Court House, handsomely fitted up for the occasion. The Chief Justice took his seat under a canopy with the Lieutenant-Governor on his right hand. The Clerk of the Crown then presented the commission to Mr. Belcher, which he returned. Proclamation for silence was made; Belcher gave some directions for the conduct of practitioners; the grand jurymen were sworn and the Chief Justice delivered his charge to them. After this the Court adjourned, and his Honour the Chief Justice, accompanied and attended as before, went back to the Governor's house. Such was the first opening of the Supreme Court of Nova Scotia."

This very graphic description recalls to us the dignity and solemnity with which our ancestors surrounded the Courts of Justice, still preserved in England, and it is not clear that we in this country have gained anything in throwing aside many of the outward forms and ceremonies, so impressive on such occasions. When the Judges of His Majesty's Supreme Court ceased to wear the scarlet robe, and Judges and barristers alike cast aside the wig, I have not been able to ascertain. That they continued to do so at the end of the last century is evident from the portraits of Chief Justice Strange and Chief Justice Blowers, both of which formerly adorned the Legislative Council Chamber, and now the portrait of the latter, I regret to say, is hidden away in one of the ante rooms of the House of Assembly. Since writing this, in conversation with Senator Dickey, the senior member of the Bar in this Province, I learn that when he first commenced practice in 1834 the Judges then wore their wigs in Court, but not the barristers.

In these observations I have, to some extent, wandered from my text. Having traced step by step the erection and constitution of the General, County and Inferior Courts, I

must not omit to state that Cornwallis and his council at the same time instituted the Court of General Sessions, stated by Haliburton to have been similar in its nature, and conformable in its practice to Courts of the same name in England.

This Court was composed of the Justices of the County Court, and afterwards of the Inferior Court of Common Pleas, associated with all Justices of the Peace. It has not been made very clear to me exactly to what extent they exercised jurisdiction in civil and criminal matters, and it seems probable that their functions were chiefly discharged in providing local regulations for the town, although doubtless some matters of a judicial nature were heard before them.

Haliburton in his brief account of our Courts, Vol. I., p. 164, says, "That in the year 1752, in consequence of many difficulties having arisen from the practice of the County Court, it was abolished, and a Court of Common Pleas erected in its place upon the plan of the Inferior Court of Common Pleas in New England. This Court sat four times a year, and the Judges were selected from among those who had presided in the County Court. Similar inconveniences having arisen from the peculiar construction of the General Court, His Majesty in the year 1754 appointed Jonathan Belcher, Esq., Chief Justice of Nova Scotia, and a new judiciary was erected in the place of the General Court, styled, The Supreme Court, Court of Assize, and General Jail Delivery, in which the Chief Justice was sole Judge, but the new Court assumed no other powers or jurisdiction than what had till then been exercised by the General Court."

In a note he further informs us, "The practice in the Supreme and Inferior Courts continued the same until the convention of the House of Assembly in 1758, when the practice of the Common Pleas was changed by a temporary Act of Legislation and a new mode prescribed compounded partly from the practice of Massachusetts, and partly from the practice of England. Upon the expulsion of the neutral French, and the introduction of the new inhabitants as settlers, new

counties were erected, and the Courts of Common Pleas became multiplied. Thus constituted, the Courts continued and practiced until 1764, when a change took place in the Supreme Court. Upon an address of the House, Governor Wilmot added two assistant judges, and appointed two members of Council to fill these situations. The powers granted to the assistant Judges by these commissions (which were drafted by the Chief Justice) were so qualified and limited that the intent of the Assembly was altogether frustrated—not having power to try a case but in conjunction with the Chief Justice, or even to open or adjourn the Court without his presence and concurrence."

With the arrival of Chief Justice Belcher commenced a new era in our Judicial annals. Hitherto no one pretending to the necessary qualifications of a Judge had presided in the Courts. Belcher was a man of good ability, good education, of experience in legal proceedings, and of a vigorous and determined character. This is evidenced by the reforms and improvements he undertook and carried out until the first Assembly was called in 1758. Cornwallis' commission authorized the summoning of an assembly chosen by the people, but in the then state of the province it could not be carried into effect. Five years and more had elapsed before Belcher came and the condition of affairs had considerably changed. He, it appears, had doubts as to the validity of at least some of the Acts and regulations of the Governor-in-Council, and pressed strongly for the calling of an elected assembly. The subject was considered in Council and he drew up a scheme for the election of members in the different inhabitated districts of the province. It was submitted and discussed at great length, and finally adopted after peremptory instructions from England came to call the assembly. The Attorney and Solicitor-General of England, Murray and Lloyd, gave their opinion, "that the Governor and Council alone are not authorised under his commission and the royal instructions to make laws. Till there can be an assembly, his Majesty has ordered the Government of the infant colony to be pursuant to his commission and royal instructions, and

such further directions as he should give under his sign manual, or by order in Council."

The Lords of Trade appear to have been much concerned over this matter, and I find among their despatches to the Governor, dated May 7th, 1755, the following reference to the subject: "As the validity of the laws enacted by the Governor and Council or the authority of those acting under them does not appear to have been hitherto questioned, it is of the greatest consequence to the peace and welfare of the Province that the opinion of His Majesty's attorney and Solicitor-General should not be made public until an Assembly can be convened, and an indemnification passed for such acts as have been done under laws enacted without any proper authority." This suggestion, as will subsequently appear, was carried out, and no doubt the perilous position in which the Governor and Council and the officers acting under them found themselves hastened the measure for calling the Assembly.

On Monday, January 3, 1757, the necessary resolutions for the purpose were passed in Council. On Monday, October 2, 1758, the newly elected members met at the Court House, 19 in number, and were sworn in. They elected Robert Sanderson their speaker; the Governor-in-Council constituted the other House, and the two the civil Legislature of the Province. Thus came into existence the only body which henceforth could make laws for the Province.

The hand of Belcher is plainly visible in the early legislation of the province. The late Dr. Aikins informed me that it was he who arranged and revised the laws which appear in our first Statute book, as appears by the copious notes and memoranda in his handwriting in the copy of the British Statutes at large in our Law Library. He adds, what may be of interest to the Bar Society, that many of the books which formed the foundation of this library are supposed to have been originally his property.

Mr. Uniacke in his compilation of the Statutes published in 1805 says: "Finding that an edition of the Acts of the Province up to the sixth year of his present Majesty's reign

(George III.) was published by the late Chief Justice Belcher with notes of law cases and marginal references to British Acts of parliament, I considered it proper to republish the same notes and references in this work, not only as a mark of respect to the high and learned character of Mr. Belcher, who was the first Chief Justice of the province, but also as affording the people of the Province a convincing proof that our predecessors anxiously endeavoured, as nearly as local circumstances would permit, to copy the laws of the mother country, and to form our establishment agreeably to the British constitution."

We must now turn our attention to the Journals of the House of Assembly and to the Statutes of the Province, and follow the course of legislation as regards the courts. One of their first acts was on October 3rd, to pass a resolution requesting the Governor that all the resolutions of His Majesty's Governor and Council heretofore made and passed, may be laid before the House, and also the collection of the English Statutes. The Governor having complied with their request, a committee was appointed, October 5th, to inspect and examine the resolutions of the Governor and Council and report to the House which of them ought to have the force of law. This report was adopted, and it was decided to incorporate the same in one General Act.

October 9th they voted that a Bill be passed for confirming the past practice of the Courts of Judicature and establishing their practice for the future, and on October 11th an Act was passed, 32 George II. chap. 27, entitled "An Act for confirming the past proceedings of the Courts Judicature, and for regulating the further proceedings of the same. "Be it enacted: That His Majesty's Supreme Court, Court of Assize and General Gaol Delivery shall be held, and kept at the usual times and places (that is to say) on the last Tuesday in the month of October and on the last Tuesday in the month of April in every year in the town of Halifax, and that a Court of General Sessions of the Peace shall be held quarterly, as usual, in every year in the said town, that is to say, on the first Tuesday in the months of December, March, June

and September, and that the Inferior Court of Common Pleas shall be held as usual on such first Tuesday in said months of December, March, June and September." The last clauses ratified and confirmed all proceedings to date.

At the same session another act was passed, entitled "An Act for confirming the past proceedings of the Court of Judicature, and for regulating the further proceedings of the same," and then another entitled "An Act in addition to and in further explanation of the last Act," which completed the legislation directly bearing on the status of the Courts and their proceedings. Thus was ratified and placed on a sound and legal footing all that had been done in our Courts up to this time.

In the following sessions Acts were passed dealing with many subjects, over which jurisdiction was conferred upon the Courts, but none intimately associated with the present subject until the year 1763, when the House of Assembly represented to the Governor-in-Council the desirability of having two more Judges in the Supreme Court associated with the Chief Justice, among other reasons, saying, "As it is conceived His Majesty's subjects ought not to rest satisfied with the judgment of one person only, and further that so important a Court should not consist of one man however capable and upright."

On the 22nd June, 1764, the Council advised that two assistant Judges of the Supreme Court be appointed in accordance with the address of the House of Assembly, and on July 13th, 1764, the Lords of Trade answered the application of the House of Assembly that two assistant Judges will be appointed so soon as they made provision for payment of their salaries. This was done, and in 1764 the Hon. John Collier and Charles Morris were appointed assistant Justices of the Supreme Court. On the 26th April, 1769, the Hon. John Duport succeeded Collier, and on the 24th May, 1770, the Hon. Isaac Deschamps succeeded Duport, who was appointed Chief Justice of P. E. Island (or then known as Island of St. John). I do not follow the list of succeeding Judges, which can be easily traced.

The next Act of importance affecting the Courts was passed in the session of 1768. By 8 & 9 George III., cap. 5, an Act was passed authorizing four terms of the Supreme Court to be holden at Halifax, that is to say, on the first Tuesdays of January, April, July and October in each year. The reason assigned in the recital was the long and injurious detention of prisoners awaiting their trial for crimes alleged against them and thereby "weakening the force and terror of the law, and also the delay in hearing and determining causes of property in said Court."

Up to this time, in fact until 1774, the Supreme Court only held its sittings or terms at Halifax. There were no terms in any of the counties, or districts, at that time laid off. Before this, terms for the sittings of the Inferior Court of Common Pleas had been provided by statute in a number of places. It is a matter of interest and some importance to find out how and in what way the Circuits of the Judges of the Supreme Court were first arranged, and under what authority the different Judges held Courts of Assize and General Gaol delivery in the various counties. The Judges do not in this Province, as in England and in some of the other Provinces, receive special commissions for that purpose, and, so far as I can ascertain, there never were any commissions for that object issued in the Province. I can find none in the Records preserved in the archives, nor were any orders in Council passed granting them.

Subsequent research leads me to qualify this statement to some extent. I do find in the earlier records of the Council that commissions for holding Courts of assize and general gaol delivery were directed to be issued, but such commissions apparently ceased after the first Legislature was convened, except in some special cases to which allusion will be made hereafter.

The authority under which the Judges act is based on the Statutes passed at different periods as they became necessary, fixing the times and places at which sittings of the Court for the discharge of civil and criminal business were to be held.

The first was enacted in the year 1774, 14 & 15 George III. cap. 6, entitled, "An Act in addition to and in amendment of an Act made in the eighth year of His present Majesty's reign entitled An Act for establishing the times of holding the Supreme Court."

As the recital in this Act is valuable from an historic point of view, I give it in full:

"Whereas many and great inconveniences have arisen, and daily do arise for want of a more speedy and full administration of Justice in the several counties in this province; that many suitors living and residing therein do sue and prosecute their actions and causes of complaint in the Supreme Court at present held only at Halifax, and that their being obliged to come from a great distance themselves, and bringing their witnesses is very detrimental, as well as expensive to them, and great injury is thereby done to individuals as well as to the public good of the province; And whereas his Majesty has been pleased to grant a commission, and appoint a Supreme Court, Court of Assize and General Delivery, to be holden in and through the province, exercising the powers of the several Courts of King's Bench, Common Pleas, and Exchequer in England, and that the holding of said Court at Certain stated times in such counties to which there is communication with the town of Halifax by land, will greatly contribute to the security of the right of the Crown as well as to the ease and welfare of His Majesty's subjects in this Province.

Be it therefore enacted by Governor, Council and Assembly, That the said Supreme Court shall from and after the thirtieth day of September next be holden in the several towns and counties at such times and in such manner as are hereafter mentioned, and that the said Supreme Court shall be, and is hereby empowered to proceed at the several sittings in and as near the same manner as hath heretofore been used in the said Court sitting at Halifax, and that the several laws of this province respecting jurors shall extend and be construed to extend to the holding of the said Supreme Court

at the said several times and places, and that all the proceedings, rules, judgments and executions of the said Supreme Court legally had made and done in and at their sittings and terms, and at the said several places, shall be good, valid, and effectual to all intents and purposes whatsoever.

II. And whereas it may be attended with inconvenience that all and every of the Judges of the said Supreme Court should be present at the several sittings of the said Courts, Be it enacted that any two of the Judges of the said Court shall be sufficient for holding the same, and transacting the business thereof at all and every of the times and places hereafter mentioned, and the legal proceedings then and there had shall be to all intents and purposes whatsoever as good and effectual as if all the Judges of the said Court were present.

III. Section 3 then specifies the places, that is to say, Halifax, Horton in Kings County, at Annapolis and at Cumberland in the county of Cumberland. The particular time for holding the terms is not specified, but the length for which the Court could sit was limited in Halifax to 14 days, unless of unavoidable necessity, when it might be continued for six days longer; in the other places, not to sit longer than five days from the opening of the Court.

This statute discloses to us the foundation of our Circuit Courts, and the reasons for their constitution, but it also discloses two other facts not generally known at the present time (1) That the two judges of the Supreme Court then presided at every sitting of the Court on each Circuit. (2) That the Circuit Courts as so constituted were not simply Courts of Nisi Prius as in England, but were invested with all the powers and jurisdiction of the full Court sitting at Halifax, and that jurisdiction continues until the present day except as modified by subsequent legislation and our rules and orders. As every lawyer knows, this is a matter of great importance in the administration of justice.

There was however a curious exception made to this state of things by a temporary Act passed in 1794, 34 George III. cap. 10, entitled "An Act providing for the Trial of Issues

by Justices of Nisi Prius in the counties of Sydney, Lunenburg, Queen's County and Shelburne." The recital explains the necessity: "Whereas it is highly expedient for the due administration of justice that Courts of Nisi Prius shall be established in the several counties of this province, in which his Majesty's Supreme Court are not now by law authorised to sit." It then proceeds to enact that in the above named counties it shall be lawful for the Governor to assign one or more justices of the Supreme Court, joining with him either one or more of the Justices of the Inferior Court to try such issues by a jury of the county, which justices shall proceed in the same manner as justices of Nisi Prius in England and with the same power and authority. The Governor was to issue a commission for holding such Courts and specify a day for the same between April 1st and October 1st. Then follows a further recital that whereas there are no practicable roads from Halifax to these several Counties by which they may be able to attend the places at the day named, the sheriff may respite the attendance of jurors and witnesses until the Justices arrival. This Act was to be in force for three years. In 1804 by a general Act, 44 George III. cap. 3, I find this Act was continued for one year, which induces me to think it had been kept alive in the meantime by temporary Acts not to be found.

It would be a tedious and unprofitable task to follow in detail the numerous changes made by the Legislature by which the present circuits of the Supreme Court were finally evolved. I merely purpose to draw attention to some of the more important and curious features in the exercise of judicial authority.

From cap. 13 of 46 George III. passed in 1805 and cap. 15 of 50 George III., passed in 1809, it appears that up to this time it was essential to the jurisdiction of the Court that the Chief Justice should be one of the Judges present. By the first of these Acts any one of the assistant judges was authorized to hold the Supreme Court in any of the Counties associated with any Justice of the Court of Common Pleas,

or any person of the profession of the law duly commissioned by the Governor and Council. By the last named Act it was enacted:

"That the said Supreme Court shall be held in each of the said Counties and districts by two assistant Justices of the said Court in the absence of the Chief Justice and in no other manner whatsoever." It is further provided that in the event of one of them being sick, or unable to attend, one Judge might hold the Court.

In 1816 by an Act 56 George III. cap. 2, the whole circuits were rearranged and increased, and in those counties where Courts of Nisi Prius had been provided for the Circuit Courts were now established.

The last legislation to which the limits of my paper will permit me to draw attention is cap. 5 of 1 & 2 George IV., passed in 1820, entitled "An Act to extend the Laws and Ordinances of the Province of Nova Scotia to the Island of Cape Breton."

That Act in the preamble recites what is well known, that the Island had been re-annexed to Nova Scotia as an integral part thereof, and provides among other things that the administration of Justice in the Island shall be conformable to the usage and practice of the Province of Nova Scotia. That the Supreme Court shall be held by the Chief Justice, or in his absence by two of the assistant Judges, or by one of the assistant Judges and the associate Circuit Judge of said Court at Sydney in the said County on the last Tuesday in August, and at Arichat on the first Tuesday of September.

By an Act passed in 1809, 50 George III. cap. 15, provision was made for the appointment of a third assistant Judge to which Foster Hutchinson was appointed on the 10th of June, 1810, thus making four Judges of the Supreme Court. He was the senior member of the Bar and a man of great learning in his profession and of irreproachable character. He belonged to the family of the historian Hutchinson of Massachusetts and was connected with Governor Mascarene. He died 18th November, 1815.

In the year 1816 a new and hitherto unknown experiment was made in connection with the Supreme Court. By the Act passed in this year, 59 George III. cap. 2, power was given to the Governor to appoint what was termed an Associate Circuit Judge, who in the absence of the Chief Justice, with any one of the Judges should be competent to hold a Court in every County or District. By the 4th section it was provided that the person so appointed should, when invested with the office, be competent to the exercise of all the duties of an assistant Judge of the Supreme Court while engaged in the said Circuit and not otherwise. There was added a proviso that nothing herein contained shall be construed to empower the person so commissioned to perform any of the functions of a Judge or assistant Justice of the Supreme Court at Halifax. Peleg Wiswell, Esquire, was appointed to this office, and, so far as I can find, he was the sole occupant of that anomalous position. It was apparently created in view of the necessity at that time of always having two Judges presiding in the Supreme Court, and the impossibility of the then number of Judges being able to be present at all the Circuits.

By the 4 & 5 George IV. passed in 1824, cap. 28, it was provided that when this office became vacant it should not be filled by the Governor. By a subsequent Act passed in 1837, we learn that the office was at that time vacant and it further recites that it will not be necessary to fill any vacancy. Nor was it filled, and the reason is to be found in a previous Act passed in 1834, 4 Will. IV. cap. 4, which made a most important change in our judicial system. The preamble to that Act is as follows:

"Whereas by the laws now in force, it is made necessary that all causes shall be tried before two or more Judges of the Supreme Court, which has been found difficult and inconvenient in practice." It was thereby enacted that after the passing of this Act it should be lawful for one Judge to preside at the trial of any and all issues as well in Criminal or in Civil causes. It was further enacted that the Supreme

Court shall hereafter be held in the several counties and districts of this province before one Judge of the said Court in the same manner as the same has been heretofore held before two Judges of the said Court.

But a further and more sweeping change in the Courts was made in the year 1841, 4 Vict. cap. 3. It was entitled "An Act to improve the administration of the Law and to reduce the number of Courts of Justice, and to diminish the expense of the Judiciary therein." By this Act the Inferior Court of Common Pleas was abolished, and its whole business and jurisdiction handed over to the Supreme Court because of the great delays and other injurious consequences in having the two Courts. Terms of the Supreme Court were made more frequent in the different counties; the office of Associate Circuit Court Judge, which had been vacant for some years, was done away with, and provision made to add one more Judge to the Supreme Court, thus, with the Chief Justice, bringing the number up to five. This additional Judgeship was bestowed upon Thomas Chandler Haliburton, popularly known as "Sam Slick," who had been one of the Judges of the Inferior Court of Common Pleas.

By the same Statute, power for the first time was conferred upon the Judges of the Supreme Court "to make and frame such rules and orders for regulating the practice thereof as shall appear to them necessary and proper to simplify the proceedings in suits in said Courts, and to prevent delay, and lessen the expense of such proceedings."

The Supreme Court Bench continued to be made up of the Chief Justice and four Puisne Judges until after the Confederation of the Provinces. The pressure of business again becoming too great for that number to dispose of it, a statute was passed in 1870 authorizing the appointment of two more Judges, thus increasing the number to seven, at which it remains at the present time. Such, in brief, is the history of our Supreme Court and the extension of its jurisdiction over the whole province of Nova Scotia, including

the Island of Cape Breton, the gradual evolution of the Circuits in the different counties, and the increase of the Judiciary in compliance with the demands of public business. The times and places for holding the Circuit Court have been changed at different periods to suit the requirements of the Province, but in these changes we have no particular interest. The full Bench, by which I mean all the Judges, sat in banco only to hear such legal questions and applications for new trials and other business as properly came up to them by way of appeal. In this way all the legal business of the province was tried and disposed of before the one Court until the year 1875, when County Courts were established with limited jurisdiction, and resident Judges in the districts for which they were appointed.

One other statute passed in the session of 1849 demands our attention. It is probably unknown to the present generation, except members of the Bar, that up to this time the Chief Justice and Judges received in addition to their incomes, in fact as part of them, fees and perquisites in all the suits brought in the Court, which must necessarily have seriously added to the costs of suitors. By 12 Vict. cap. 1, passed in 1849, entitled an Act for transferring the Crown Revenues of Nova Scotia and providing for the civil list thereof, after reciting that, "whereas it is intended that the salaries allowed to the Chief Justice and assistant justices of the Supreme Court shall be in full of all fees, perquisites, and emoluments whatsoever, save and except the travelling fees allowed by law: It is therefore enacted that it shall not be lawful for the Chief Justice, or any assistant or Puisne Justice of the Supreme Court to take or receive, or for the Prothonotary or any other officer for or on behalf of the said Chief Justice or any such assistant, or Puisne Justice, to demand, take or receive any fee, perquisite or emolument whatsoever for or in respect of the issuing, endorsing or making of any writ or filing any declaration or entry of any cause, or of the trial of any cause or of the signing of any judgment, or taxing any bill of costs, or for or in respect of any other

proceedings had in any cause in the said Supreme Courts, but thereafter the demanding, or taking of any such fee, perqusite, or emolument shall absolutely cease, and determine; Provided always that such Chief Justice, or assistant or Puisine Justice shall receive the travelling fees allowed or which may hereafter be allowed."

I think all will admit that no wiser piece of legislation in reference to the Judicial office was ever placed upon our Statute Books.

But I must stop here, as it were, in the very midst of my subject, which even another paper of equal length would by no means exhaust.

I have left almost untouched the history of the Court of Common Pleas. I have not even mentioned some of the most important Courts which have in the past shared—many of which now share in transacting the judicial business of the country, such as the Court of Chancery and some of the distinguished Masters of the Rolls who presided therein; the Court of Probate, which deals with wills and administration of Estates; the Court of Error and Appeals; the Court of Marriage and Divorce; the Court of Escheat; the Court for the trial of Piracies, and the Court of the Vice-Admiralty. Connected with several of these Courts there is much interesting and useful information to be found in our ancient records. I have said nothing of the barristers and solicitors—many of them distinguished in their professional and political career, who have adorned with learning and eloquence our halls of justice and our Legislative Assemblies. I have made but slight reference to the many eminent Judges who have worthily presided in our Courts, and taken such a prominent and useful part in moulding and settling on sure foundations the laws under which we live. All such interesting information must be reserved for a future time, or for the research of some other investigator, who will find in our musty records ample material to justify the labour it will involve. I cannot lay claim to anything original in these pages which, as stated

in the outset, were simply intended to set forth in connected and historical order the sources and foundations of our Courts of Justice, which have administered from the beginning and do now administer the law of this Province — those Courts which are bound to uphold and guard with jealous care the rights and liberties which we British subjects have inherited as our birthright, and are entitled to enjoy as our most cherished possession.

CHARLES J. TOWNSHEND.

HISTORY OF THE COURT OF CHANCERY IN NOVA SCOTIA.

BY

CHARLES J. TOWNSHEND.

The Court of Chancery in Nova Scotia was constituted simultaneously with the Courts of Common Law at the foundation of Halifax in the year 1749. The commission which authorized Cornwallis to create Courts of Justice in the Province and the accompanying Royal Instructions conferred the powers necessary for that purpose. Clause 10 of the Royal Instructions reads as follows:

"It is therefore His Majesty's will and pleasure that one principal Court of Judicature should be held twice a year, or oftener as you shall judge expedient, by the name of the General Court, and to have the jurisdiction of all causes real and personal at common law above the value of five pounds, to act as a Court of Chancery, but not without appeal to his Majesty when the matter in question shall exceed three hundred pounds sterling, as also to try all criminal cases that may come before the said General Court, which said Court, it is his further will and pleasure, should consist of the Governor, or Commander-in-Chief, and the Council of the said Province for the time being, and five whereof is a quorum."

By virtue of this authority the Governor with the assistance of his Council for several years, and subsequently without the members of Council, exercised Chancery jurisdiction until the first Master of the Rolls was appointed by Royal

Missing Page

Missing Page

Commission in 1825. His full title was Governor and Commander-in-Chief in and for the Province of Nova Scotia and its dependencies, Chancellor, and Vice-Admiral of the same. In all the Chancery records preserved when the Court sat as a Court of Chancery for the trial of equitable suits his name is entered on the record as "The Chancellor."

Stoke in his book on the Colonies says:

"Every Governor of the Province by his commission is (1) Captain-General of the Forces. (2) Its Governor-in-Chief is one of the constituents of the General Assembly. (3) The Governor has the custody of the Great Seal, and is Chancellor within the Province with the same powers of judicature that the Lord High Chancellor has in England. (4) He is ordinary within his Province. (5) He presides in the Court of Error, of which he and the Council are Judges, to hear and determine all appeals in the nature of writs of error from the Superior Courts of Common Law in the Province. (6) The Governor is Vice-Admiral within his Province, but does not sit in the Court of Vice-Admiralty, there being a Judge of that Court who is usually appointed from England."

In my former paper I detailed the several steps taken by our early Governors for separating the judicial from the executive functions of the Council, by first erecting the County Courts, afterwards styled "The Inferior Court of Common Pleas," and secondly, by constituting the Supreme Court, with Chief Justice Belcher at its head, thus superseding the jurisdiction of the Governor and Council, up to that time exercised as "The General Court" in all common law actions. The residuum of judicial power originally committed to the Governor and Council as a Court of Chancery was still retained, and was regularly exercised until the appointment of the first Master of the Rolls, when the Governor ceased to hear and adjudicate in equitable matters except when coming before him as Chancellor by way of appeal.

Haliburton, who wrote the History of Nova Scotia in 1829, makes a brief reference to the Court of Chancery in the following terms:

"The Governor is Chancellor in office. The union of these two offices is filled with difficulties, and when the Governor is, as has been the case in all the Colonies of late years, a military man, they seem wholly incompatible . . . The Court of Chancery in this colony has never been conducted in a manner to create the dissatisfaction alluded to in other Provinces, but the increased business of the Court, the delicate nature of the appointment, and the difficulties attending the situation, induced our late Lieutenant-Governor, Sir James Kempt, to request his Majesty's Ministers to appoint a professional man to fill the situation of the Master of the Rolls, and the Solicitor-General has been appointed to that office, with a Provincial salary of £600 a year. This is the first appointment of the kind ever made in the Colonies. It may still be doubted whether it would not have been more advantageous and convenient to the country at large to have abolished the Court altogether, and to have empowered the Judge of the King's Bench to sit as Judge in Equity at stated and different terms from those of the Common Law Court. The nature of the Court as at present constituted admits of great delays. An appeal lies from an interlocutory decretal order of a Chancellor to His Majesty in Council and so toties quoties, by means of which the proceedings may be protracted by a litigious person to an indefinite length. The unnecessary prolixity of pleadings which characterizes the Chancery at home has been introduced into practice here, and the expense and delay incidental to its proceedings are not calculated for the exigencies and means of the country."

The lapse of time, together with the great and radical changes effected in our judicial procedure by legislation, has left the profession of to-day in almost total ignorance respecting the old Court of Chancery, when our Governors were the Chancellors. How that jurisdiction was exercised, what practice was adopted, and the nature of the litigation coming before the Court, it may safely be said, is at the present time unknown. No book has ever been written on the subject, and no continuous record easily accessible has been kept. Those which remain have been stored away in the

lumber rooms of the Court House, covered with the dust of many years, rendering any study of their contents a work of great difficulty and patience. Until the researches which led to this paper were undertaken, I had the impression which generally prevailed among those who thought on the subject at all, that the equity administered in that Court was of a very crude character—in legal slang, "was measured by the length of the Chancellor's foot," which interpreted would mean, according to the Chancellor's own peculiar notions of what was just and equitable. An examination of the Chancery records and Chancery papers in the archives of the County Court House will rapidly dispel this erroneous conception, and show it to have been a mistake due to the mists surrounding the whole subject. It is one of the objects of this paper to throw some light on the procedure and doings of this high tribunal, which in the past played an important part in our judicial annals. The abolition of the Court of Chancery, nearly fifty years ago has led to its existence being almost forgotten. The solicitors and counsel who practised before the Court have now all, or nearly all, passed away. The busy life of succeeding practitioners has given to them little or no leisure to study the history and preserve the traditions of a tribunal no longer useful or valuable to their practice. This alone is sufficient to explain the indifference which has prevailed, and the obscurity which has gradually and imperceptibly enveloped everything relating to the Court. Nothing was known as to the mode in which the Governor exercised his jurisdiction as Chancellor, nor as to the practice and procedure adopted—not even the nature of the suits and other equitable matters which came before him. The Governor was generally, if not always, a layman, unversed even in the common law—and much less in equity jurisprudence. Hence came the natural and important inquiry, how was it possible for an untrained layman to properly adjudicate in equitable matters? It is a notable fact, disclosed by an examination of the provincial statutes, that prior to the appointment of the Master of the Rolls in 1825 no legislation of any kind affecting the Court of Chancery

was passed with the exception of two Acts regulating the costs and fees to be taken by the officers of the Court. During the same period many Acts of importance were passed in reference to the Supreme Court, the Inferior, and other Courts, dealing with their jurisdiction and procedure, while the Court of Chancery seems to have escaped all legislative interference. It can only be conjectured that this was due to the belief that the Chancellor's jurisdiction was beyond the scope of legislative action, or that the Court gave such general satisfaction that legislation was unasked for.

The record books of the Court of Chancery have been preserved in which the proceedings are carefully transcribed from the first beginning in the year 1751, two years after the settlement of Halifax, with the exception of a few years. These records have been kept with more or less accuracy and detail up to the time of the appointment of the first Master of the Rolls, and subsequently by the officers of the Court until its abolition. The papers and documents embodying the proceedings and decrees in the various suits are also to be found carefully filed, numbered, and indexed.

From the pages of the old book I have been able to gather much interesting and useful information. It is indorsed as follows:

"CHANCERY.

The old book and only one formerly kept in that Court."

On the inside of the first cover James Burrow, Registrar of the Court, on the 14th February, 1774, made this note:

"From the records and papers put into my possession as Registrar of the Court of Chancery in this Province, I have selected all the minutes I could find in each cause, and have accordingly put them together into this book from folio 43, it being brought up no further, agreeably to their dates, in order to make it as complete as the materials would allow—also formed an index, by which the contents are at one view seen." He then adds: "This and a parchment covered book

(which contained fair copies of the articles inserted in this from folio 1 to folio 14, and seemed to have been designed to be continued), were all the books belonging to this Court that I received."

Owing to the care and accuracy of Mr. Burrow, we are thus assured that we have practically a record of all proceedings in Chancery from the institution of the Court.

It is evident from this record that the Governor sat as Chancellor, assisted by members of the Council. The process issuing out of the Court was signed by the Chancellor and the Secretary, as he was then called, William Cotterel, who was therefore the first Registrar of the Chancery Court. From a note in the Nova Scotia archives it appears that he was the first Provost Marshal of the Province, and was succeeded in the office by Captain Foy. He was appointed a member of the Council 23rd October, 1752, and was at that time acting Provincial Secretary. That the Governor aided by the Council at first composed the Court of Chancery, is shewn by the record of the first case actually heard—the case of Johannes Bernett, complainant, against Joseph Jones, defendant. This was a bill filed for relief from a contract of purchase on 18th day of March, 1751. After the defendant had made full answer, an interlocutory injunction was granted restraining the defendant in certain proceedings he had before commenced against the complainant in the Common Law Court, and on the 5th December, 1751, the cause was heard. The final decree recites as follows: "This cause coming to be heard before His Excellency Edward Cornwallis, Esquire, Captain-General and Governor in Chief in and over the Province of Nova Scotia, and the members of His Majesty's Council for the said Province, sitting by Royal authority as a Court of Chancery, in the presence of the attorneys on both sides." And the decree concludes: "And it is therefore on this said present sixth day of December in the year aforesaid, by His Excellency and the said High and Honourable Court, and the power and authority thereof, ordered, adjudged, and decreed, that this decree, and all the matters and things therein contained, do stand absolutely ratified and confirmed

by the order and authority of this Court, to be observed and performed by all the parties concerned according to the terms and true meaning thereof." The point at issue between the parties to this action was the validity of an agreement verbally made by the complaint with the defendant for the sale of his house and lot. The defendant had gone into possession, and paid part of the purchase money. According to the laws then in force no transfer of title could be made without the sanction of the Governor, which had been refused. The complainant, after notifying the defendant that he was unable to complete the title for want of His Excellency's assent, then conveyed the house and lot to William Hoffman, but the defendant, who had in the meantime placed improvements on it, refused to give up possession, and commenced an action for damages against the complainant in the County Court. On this state of facts the bill was filed, and the Court in their judgment say: "His Excellency and the members of his said Majesty's Council, acting as aforesaid as a Court of Chancery, doth order and decree that the complainant should stand absolutely discharged and free from the agreement aforesaid made between him and the said defendant, and that the same being made without His Excellency's privity and consent was of no effect, neither was the defendant bound thereby, and that the said deed so executed by him to the said John William Hoffman, and approved and registered as aforesaid, was a perfect and absolute deed and conveyance of said lot, and that the property was absolutely vested in the said John William Hoffman." The decree further directs that the lot be discharged from the attachment placed upon it by the defendant, and that possession thereof be forthwith delivered to Hoffman. The money paid by the defendant on account was directed to be repaid to him within one month, and each party was condemned to pay his own costs. The defendant in his answer took exception to the jurisdiction of the Court, averring that the complainant's remedy, if any, was at common law, which exception, however, appears to have been overruled. Such was the nature and determination of the first suit in equity tried in this Province. The whole plead-

ings, arguments, motions, and decree are transcribed with great fulness, enabling us to form very correct ideas of the Court's procedure and action. I have given these in some detail for that reason. It would take too much space, and not be of any great advantage, to give particulars of those which followed. There is one, however, of a somewhat interesting character to which I must allude—the suit of the Marquis de Conty and Gravina against William Magee and wife, John Brenton, John Grant, and William Nesbitt, which was commenced on the 10th December, 1753. The proceedings are recorded at great length. The defendants appear to have invoked all sorts of devices to delay the complainant and to impede the progress of the cause. Demurrer was filed, motions made, examiners appointed, evidence taken under interrogatories, references made to the Master, reports thereon, exceptions thereto; but finally the Marquis prevailed and obtained a decree in his favour in 1754. This record goes on to state: "After pronouncing the final decree in this cause as above, the solicitor for the defendants made a motion (which he desired might be recorded) to be allowed an appeal from the sentence of this Court to the High Court of Chancery in England, which being considered by the Court, the same was refused, the Court knowing of no right or authority whatsoever they have to grant an appeal in any case but to His Majesty in Council. Thereafter the solicitor for the defendants made a second motion to be allowed an appeal to his Majesty in Council. The Court refused the motion, the same being insufficient." I have no information respecting the Marquis de Conty and Gravina, but gather from the papers in the cause that his wife died in Halifax leaving considerable property, which she probably bequeathed to others than her husband, and appointed some of the defendants her executors. They took possession of the assets, and this bill was filed on the ground that the will was void having been made without her husband's consent. It further appears that they had in their custody his child and would not permit the Marquis even to see him. The Court directed that he be allowed to do so. The final decree was as follows:

"It is therefore this present day, viz., the 13th day of August, 1754, and in the 28th year of His Majesty's reign, by His Honour Charles Lawrence, Esquire, President of His Majesty's Council, and Commander-in-Chief of this Province, and the Honourable the rest of the members of the said Council, sitting as a Court of Chancery of the said Province, and by the authority of this high and honourable Court, ordered, adjudged, and decreed—" showing that at this date the Chancellor decided suits in Chancery with the aid of the Council. Another amusing episode of this trial I cannot forbear relating. On the 19th March, 1754, there was a hearing on some interlocutory matter. The record goes on to say:

"The parties having been fully heard were ordered to withdraw that the Court might consider the argument on both sides, when Mr. Grant, one of the defendants, struck Mr. David Lloyd, one of the plaintiff's solicitors, upon their withdrawing from the Court room, of which Mr. Lloyd immediately complained, and prayed the Court's protection."

The Court immediately decided that Mr. Grant had been guilty of a high contempt of His Majesty's Court, and directed the Marshall to take him into custody, and commit him to prison until the further order of the Court, which was done. The next day Mr. Grant offered a most humble apology for his high offence, and with the consent of Mr. Lloyd he was discharged from prison. All which goes to show considerable feeling between the parties on the subject-matter of the suit.

There are many other records in this interesting old book to which I should like to refer in detail—a reference to one I will make, as interesting to members of the profession. In the case of Anderson v. Taylor, 14th June, 1756, a bill of foreclosure, I find that the English practice was followed. The decree is "that Taylor, the mortgagor, have leave to redeem the premises within the space of six calendar months, or otherwise, as the complainant is now in possession, that the defendant's right of redemption be foreclosed, and the premises enjoyed by the complainant, his heirs and assigns, as their property." We have adopted a different mode of

foreclosure, which has been used for many years, and, for reasons which I shall give later on, the English practice could not have prevailed for any length of time.

The jurisdiction of the Court of Chancery, as I have already shown, was at first exercised by the Governor with his Council sitting as a Court, but the constitution of the Court was changed. The exact time I have not been able to fix, owing to the omission of the Registrar of the names of those present. But on the 13th May, 1767, from an entry of that date it is plain that the Chancellor presided alone, assisted by Masters in Chancery, who were lawyers. The entry is as follows:

BETWEEN,

WILLIAM BUTLER, *Complainant,*

AND

ROBERT CAMPBELL, *Defendant.*

LORD WILLIAM CAMPBELL, *Chancellor.*

JOHN COLLIER,
CHAS. MORRIS,
RICHARD BULKELEY, } *Masters.*

A hearing took place, and decree was made. That this continued to be the constitution of the Court from 1767 until 1825, is very clearly shewn by the Chancery Minute Book B. commencing in 1773, and kept by Mr. James Burrow, the Registrar, ending in December, 1782, and by the succeeding books of record.

Mr. Burrow appears to have been an excellent and careful officer. He was appointed Registrar and Clerk 29th May, 1773, by Lord William Campbell, and subsequently re-appointed by Francis Legge, Esquire, then Governor, 16th August, 1774.

He has in a memorandum affixed to Minute Book B. furnished us with a complete account of the Chancery records at that date, which is as follows:

1. Book kept by the former Registrar.

Books in Chancery opened by Mr. Burrow, now in use:

No. 1. Registrar's Minute Book.
2. Record of all papers filed.
3. General Writ Book.
4. Order Book.
5. Deposit Book.
6. Copy of all receipts for money deposited.
7. Copy of all receipts for money returned.
8. Book of Decrees.
9. Table of Fees.
10. Distribution Book of Chancery Heirs.
11. Receipt Book for money paid by the Registrar to the officers in Chancery.
12. Receipt Book for delivery of all papers and records when under consideration of Masters.
13. Record of all officers in Chancery.
14. Copies of Commissions by which officers are made or admitted in Chancery.

22 MARCH, 1777.

In Book A., which is the Chancery record of office of the Court, and their commissions, and when appointed, we find the following names and officers:—

His Excellency Francis Legge, Esquire, Chancellor.
Charles Morris, Esq., Master.
Richard Bulkeley, Esq., Master.
James Burrow, Esq., Registrar.
John Slayter, Clerk to the Registrar, and afterwards appointed Deputy Registrar.
Richard Gibbons, Esq., Solicitor.
James Monk, Esq., Solicitor.
Daniel Wood, Esq., Solicitor.
W. F. Eaton, Provost Marshall, afterwards Sergeant-at-Arms to the Court.
A Crier and Messenger, name not given.

In another book entitled the Registrar's Minute Book, which is Book B., he has made the following valuable historical note:

"Province of Nova Scotia, Court of Chancery, Registrar's Minute Book, regularly entered from the hearings of every cause, and the proceedings of this Court, beginning with the 20th October, 1773, and ending with the . . . (a blank not filled). In a note he says: "The first business I acted in Chancery after my appointment of Registrar arose soon after the arrival of His Excellency Francis Legge, Esq.—" Then follow entries in the various causes and the doings of the Court therein from the date above mentioned until 21st December, 1782. The first entry, 20th October, 1773, is in the cause of Malachy Salter v. Gresham Tufts. In this cause the Chancellor ordered the parties and their counsel to attend before him at the Governor's house. Then follows the record of the sitting of the Court:

AT THE GOVERNOR'S HOUSE, 12 O'CLOCK NOON.
MONDAY, NOV. 1, 1773.

Present:

HIS EXCELLENCY THE CHANCELLOR.
MR. BULKELEY AS MASTER IN CHANCERY.
THE REGISTRAR.

The parties attending with their counsel, viz., Mr. Gibbons, for the complainant, and Mr. Wood, for the defendant. The petition of Thomas Bridge as attorney to the complaint was read, and the Court considering the same observed there appeared to be no affidavit from the principal himself to support the matter of fact stated in the petition on which he founded the prayer, and as such affidavit was indispensably necessary for proceedings of this nature in Chancery, the parties were directed to attend at ten o'clock to-morrow, and the Chancellor would then proceed further, upon which the Court finished for this day.

At ten o'clock the next morning the Court opened at Governor's House, but the parties and their counsel were not there, as appears by the following note: "The Court present as yesterday, but the parties not appearing till near eleven were directed by the Chancellor always in future to be punctual to the hour ordered, for he would be exact himself, and expected the same from them." The Court then proceeded to

the hearing, of which full details are given, and the Chancellor then gave his decision: "The Court therefore considering the whole matter, and paying due attention to the pleadings and allegations of each party; and those on the part of the complainant, supported by the affidavit of Thomas Bridge, not appearing strong enough to continue the injunction, doth order that the same be dissolved, and that the defendant be at liberty to take such execution or executions on the judgment so obtained as he shall think fit." From the fact that one Master only was present on the hearing of this case, it is evident they were no necessary part of the Court. I have, however, gone carefully through the record contained in this book, and find that as a rule the same two Masters, Richard Bulkeley and Charles Morris, were always present assisting the Chancellor at the hearings. Later on different Masters performed the same office. On some occasions I find the common law Judges were called in and sat with the Chancellor, no doubt advising him on the more intricate questions coming up for decision. But in pursuing my investigations I have been surprised to find that, contrary to the common impression, there was a Master of the Rolls who sat with the Chancellor prior to 1825. The first record of the existence of such an officer is to be found in the Minute Book of the Court of Chancery commencing 31st March, 1789. The following note is on the first page:

"First Court of Chancery held in which J. Gautier acted as Clerk or Deputy Registrar." Then follows:

"Court of Chancery.

1789.

March 30. Present—The Chancellor,
Master of the Rolls,
Master in Chancery."

Then names are given: Governor Parr,
H. R. Bulkeley,
F. Hutchinson.

"Court opened in Governor's House. Six causes were set down for hearing, but the Court adjourned to 4th February, 1790, when this record is made. A desultory conversation

took place. Much was said of former causes, and of the above, but the gentlemen of the Bar not being sufficiently prepared, the Court adjourned to the 11th inst." Following the record we find that at the ensuing seven sessions of the Court is was similarly constituted, the Master of the Rolls always being present. In the next eleven sessions of the Court we find, in addition to those already mentioned, the Chief Justice, Sir Andrew Strange, sitting with them. The five following sessions were presided over by the Chancellor, the Master of the Rolls, and Master in Chancery. On the 22nd January, 1793, the Court was held in the Court House, and then were present in addition to the Chancellor, Master of the Rolls, and Master, the Chief Justice and Judge Brenton. The Registrar notes that the Chancellor was assisted by these two common law Judges. These same Judges, or one of them, continued to attend the sessions of the Court from this time —not in all cases, but apparently in the majority of them. We are therefore quite safe in drawing the conclusion that from the inception of the Chancery Court to the appointment of Mr. Robie by Royal commission, the proceedings were presided over by the Chancellor, at first with the Council as a component part of the Court, and some ten or twelve years later by Masters in Chancery, and one or more of the common law Judges.

I find the following memorandum made in Book Chancery No. 1, by James Gautier, Clerk, which should be preserved as showing the condition of Chancery records at that date:

"Memorandum — Halifax, Nova Scotia. On the 27th May 1792, the Honourable Mr. Richard Bulkeley, Master of the Rolls in Chancery, deposited or gave me in charge for the first time the following books relating to Chancery, which I had never seen before, although I had acted as Registrar or Clerk from the above printed period (25th January, 1788), viz., Chancery box in the secretary's office—a parchment book —No. 1, a marble covered book—No. 2—do. 3, do. 4 (5, 6, and 7 wanting), do. 8 (9 wanting), do. 10 and 11 in one book, do. 12 and do. 13 and 14 in one book. Every cause in Chancery is

now numbered from No. 1 and so on, bearing reference to then books of Chancery No. 1 and 2. From the year 1775, in fact, but more so from 1777 and 1778, the whole record of the proceedings in Chancery seems to have dropped, and most of the books mentioned in the first sentence of this memorandum from No. 1 to 14 were exclusive of that, but little wrote in. For further particulars see Chancery book, No. 2."

I have already mentioned my surprise at finding the title "Master of the Rolls" given in the Chancery records prior to 1825, it being beyond doubt that no such Judge with a Royal commission had up to that time been appointed. The Master of the Rolls is invested with the same judicial power and authority possessed by the Master of the Rolls in England, and as the appointment emanates from the Crown, the office being held under Royal commission, such a title conferred on an officer of the Court not invested with judicial authority was a misnomer—a misconception of the nature of the office. The explanation seems to be that the person called "Master of the Rolls" in these entries was simply the first Clerk, or senior Master in Chancery, but had no judicial authority. The fact that he is never recorded as presiding in Court alone, but always with the Chancellor, brings out clearly his true position. Afterwards when the Master of the Rolls was appointed by mandamus from the Sovereign, he always presided in the Court of Chancery as the sole Judge, and from his orders and decrees there was an appeal to the Governor as Chancellor. On the hearing of such appeals the Chancellor generally, if not always, called in one or more of the common law Judges as his assessors.

With these records before us we can at this day form a very fair conception of the old Court of Chancery presided over by our Governors as Chancellors. We further glean from them that the sessions of the Court were at first held in the Governor's house, then in the council chamber, and finally in the Supreme Court room in the Province building, now occupied by the legislative library. Masters were appointed. There was a Registrar and Deputy Registrar, Sergeant-at-Arms, and crier or messenger, and lastly solicitors duly

enrolled and entitled to practise in the Court. It would appear from an entry in one of the Chancery books that the barristers and solicitors had not been always in the habit of attending the sittings of the Court in proper costume. A special order was made in the time of Governor Legge that in future all gentlemen practising before the Chancellor must come properly robed.

Let us next turn our attention to the practice and procedure of the Court, and observe how and in what manner its business was carried on. Some particulars of the earliest cases coming before the Court for adjudication have already been given by way of illustration. These, however, by no means cover the whole field of Chancery litigation. We find that defendants were brought into Court by the old process of writs of subpœna regularly issued, tested in the name of the Chancellor, sealed with his private seal, signed by the Registrar, and served by the Provost Marshal, and afterwards by the Sergeant-at-Arms, who was sheriff of the county of Halifax. Bills of complaint, answers, pleadings, and demurrers were duly filed. Motions, references to Masters, interrogatories administered and taken before examiners, orders and decrees made and duly enrolled. Every known subject of equitable jurisdiction, from time to time, seems to have come before the Chancellor for hearing and decision. Briefly to enumerate some of them extracted from the very complete index kept by the Registrar, I find bills to set aside agreements—for injunctions—for injunctions against proceedings at law—for account and relief—for foreclosure—for specific performance—for account and dissolution of partnership—for discovery—for redemption—for contribution among sureties—for dower—for partition—for writs of *ne exeat regno* — for *scire facias* to repeal letters patent — for administration of trusts and estates — for writs of *de lunatico inquirendo*—for writs of *certiorari*—and lastly one application for a writ of *audita querela*, which, on the advice of the Chief Justice, was not granted. The above list of subjects shows that the scope of the business must have been

quite extensive, and the subjects such as to demand considerable knowledge of equity proceedings and principles. I have not pretended to investigate the correctness of the Chancellor's decrees, nor would it serve any useful purpose now to do so. Bills for foreclosure, as we should expect, largely predominate. Many of the modes of procedure then in use have been swept away by the spirit of modern reform. It is only interesting to us now as showing a Court of equity then in the Province adjudicating and proceeding in all matters requiring equitable relief.

I now come to the important inquiry as to the practice and procedure which governed our old Chancery Court. Our early Governors being laymen, it occurred to me that their methods of procedure would be of the simplest character, untrammelled with the fixed equity rules and practice of the mother country. This, however, was not the case. Fortunately, we have in one of the Chancery books of record most complete information on this point. The practice, generally speaking, was in conformity with that in vogue in all equity courts at that period. But the particular code of procedure and general rules contained in the book above referred to lead to the conclusion that they were taken from and founded upon the procedure then in force in the Irish Court of Chancery. It bears internal evidence of this from its frequent references to the city of Dublin in fixing the times for service of writs and notices. In corroboration of this is the fact that the method of foreclosure and sale in use in Ireland, which we retain to the present day, was adopted.

These rules and orders are all to be found in Book A., Chancery Rules of Practice, in manuscript, written out in a clear, legible style, with the following heading:

"The procedure of the Rules and Practice of the High Court of Chancery as they arise upon the several pleadings and proceedings in causes according to this order."

Later on in the same book is a second set of Rules, headed "A Collection of Rules and Orders in Chancery," also in manuscript, made, probably, at a later date, and a revision of the former. In this set are to be found, in explanation

and support of the various rules, citations from the decisions of the Irish Chancellors, all pointing to the source from which they were evidently taken.

No doubt these rules must have been prepared and adopted at a very early date in the history of the Court. No change appears to have been made in them until 26th December, 1833, when a new or added set of rules was made. This addition was made in the last year Mr. Robie held the office of the Master of the Rolls, and it would seem that just before complaints had been made and legislation enacted to compel improvements in Chancery procedure.

Mr. Beamish Murdoch, who published his Epitome of the Laws of Nova Scotia in 1833, thus speaks of the Court of Chancery as regarded at that date: "Any one who will deliberately read through the long, unmeaning, but expensive forms of bills and answers in Chancery, and the absurd and unnecesary processes of contempt, as they are called, must be blinded by a reverence for antiquity, if he does not think them unreasonable. Those who are (as clients) made acquainted with the dilatory and unsatisfactory progress of any business which goes into Chancery, will feel convinced that there is something wrong in a system productive of such results. I have touched upon changes of an extensive nature, because I have reason to think that some alterations of importance are wished for by gentlemen whose long professional experience and high station in the Courts, and at the bar of this Province, render them the most competent judges of the extent of the evils arising from the present system. The Court of Chancery in England has become a national grievance from its expense and delays, and some of the colonies and many of the United States have no Court of Chancery, being disposed rather to submit to many of the strict rules of the common law in ordinary cases, and in important questions to resort to legislative Acts."

This extract probably reflects correctly the opinion of the profession and public at large at the time it was written, respecting the Court of Chancery in this Province. As already

noticed, it was just then that the Legislature took the matter in hand, and passed a statute requiring and authorizing the making of new rules for expediting and cheapening procedure in the Court.

The new rules bear the following heading:

"COURT OF CHANCERY,—20 Dec. 1833.

"His Honour the Chancellor, by and with the advice of the Master of the Rolls, doth hereby order and direct in manner following, that is to say." Then come twenty-two new rules not meriting any particular notice here. An appeal is provided for from the Master of the Rolls to the Chancellor, and, as we already know, where the amount in litigation exceeded £300, there was a further appeal to the Judicial Committee of the Privy Council.

I do not find that any new or additional rules were made during the period the office of Master of the Rolls was held either by Mr. Fairbanks or Mr. Archibald. But on the 26th August, 1846, shortly after Mr. Stewart's appointment, a number of new rules were made, and some of the previous orders were rescinded. Mr. Stewart, during his incumbency of office, continued from year to year to promulgate new rules, doing away with many of the old and cumbersome ones, and generally improving the mode of procedure. It will be sufficient to give the date of their enactment to shew how assiduously the last Master of the Rolls was working to reform the procedure of the Court of Chancery, and to clear away many objectionable features which had grown up in the course of years. The succeeding new rules and orders were made in rapid succession as follows: 1 Sept., 1846; 31 Dec., 1847; 17 Jan., 1848; 27 Jany., 1848; 15 May, 1848; 20 Nov., 1848; 4 Jan., 1849; 13 Dec., 1849; 4 June, 1849; 29 Jany., 1850; 31 Jany., 1850; 1 March, 1850; 2 March, 1850; 7 Jan., 1851; 25 Feb., 1851; 13 March, 1852; 5 May, 1852; 4 May, 1852; and 14 Dec., 1852.

It would, of course, be out of place in a sketch of this kind to discuss or comment on the great changes effected

in Chancery methods by these rules, but by any one sufficiently interested critically to make an examination, it will be found that many of the reforms in practice subsequently adopted in our present Judicature Act were brought into force.

That the Court of Chancery did a large and increasing share of the judicial business of the Province is evident from the number of cases entered. From the records it appears that up to the year 1799 there were heard and determined 133 causes and matters, and altogether from the year 1751 until the year 1856, when the Court was abolished, 1,904, which is sufficient proof that in its latter years it was kept busily employed.

Among the many professional men who practised before the Court are the names of those familiar to us and distinguished in our political and judicial annals. Gibbons, at one time Solicitor-General, and later Attorney-General, for the Province; Monk, who subsequently became a Judge of our Supreme Court; Blowers, at one time Chief Justice; Richard John Uniacke, once Attorney-General; Foster Hutchinson, one of our Supreme Court Judges; Robie, who became first Master of the Rolls; Young, who became Chief Justice; Johnston, later an Equity Judge; and John W. Ritchie, his very able successor. There were many others, whose names time alone prevents me from mentioning. The well-known reputation of these lawyers is a sufficient guarantee that, especially in later times, the matters litigated in the Court of Chancery must have been tried with learning and accurate knowledge of equity jurisprudence. It is not my intention to follow and point out in detail the proceedings of the Court of Chancery during the period the Lieutenant-Governor was Chancellor and sole Judge of that Court—not that the records do not afford abundant material both interesting and instructive, but, properly to tell the history of the Court from the year 1825 until it ceased to be in 1856, demands the remaining portion of my paper.

The business of the Court of Chancery had gradually increased, and the Governor had for some years been striving

to have a regular Equity Judge appointed. In 1818 Lord Dalhousie, then Governor, had actually commissioned Chief Justice Blowers as Master of the Rolls, but on reference to the Imperial Government it was disapproved of, and the commission cancelled. No reason is assigned for this, and I only assume that the Home Government so refused because the two positions were incompatible.

On Tuesday the 14th February, 1826, the Lieutenant-Governor by message informed the Assembly that, having experienced considerable difficulty in discharging his duties as Chancellor for want of a competent legal assistant, unconnected with any of the common law Courts of the Province, he had deemed it his duty to represent to his Majesty the necessity of appointing a Master of the Rolls, and had at the same time recommended Mr. Robie for the appointment. The King having approved this, his Excellency now suggests to the Assembly the expediency of their making suitable provision. He had commissioned Mr. Robie as Master of the Rolls under a conviction of the necessity of the office. On Tuesday the 21st February the message received from his Excellency relating to the appointment of Master of the Rolls, upon the second reading of a resolution of the committee that it was expedient to make a suitable provision for this office, underwent considerable discussion. It was supported by the Speaker, Messrs. Fairbanks, Lawson, Uniacke, and Fraser, on the ground that his Excellency had experienced difficulties in presiding in the Court of Chancery, having felt himself not altogether competent to decide upon the matters which came before him; that it was a boon which his Excellency deserved from his zeal for the public service and the general interest of the Province; that the recommendation not only came from his Excellency, but also from his Majesty's ministers; and that the peculiar favours which this Province had received from the mother country had every claim upon respect and gratitude. Mr. Young considered that it would be highly improper to run in the face of his Excellency's recommendation, but when he considered the very heavy expense the judicial establishment was to the

Province, and that it was the first appointment of a Master of the Rolls throughout the British foreign possessions, it would be well to pause before they made the appointment. He therefore recommended it to be limited to the period of his Excellency's administration—this mode, he thought, would be treating his Excellency's message with more distinguished consideration, and would enable the Province to judge whether the advantage arising from the office was commensurate to the expense. Messrs. B. DeWolf, W. H. Roach, and Church strongly opposed the measure. The committee divided, and the question was carried, twenty voting for it, and ten against it. The bill subsequently passed this session giving £600 a year permanently as salary of the Master of the Rolls. Mr. Robie was made Master of the Rolls. The Act which thus made the first provision for Master of the Rolls will be found in the Provincial Statutes, Chapter XI., passed in the year 1826. It is not otherwise of importance than as fixing the salary in lieu of all other charges or fees.

Simon Bradstreet Robie was by Royal commission appointed first Master of the Rolls for the Province of Nova Scotia on the 5th December, 1825, and held that office until his resignation in 1834. His commission is duly registered in the record book of office, and I give it in full. The subsequent commissions to his successors were in the same language.

"George the Fourth, by the Grace of God, etc., etc. To our Trusty and well-beloved Simon Bradstreet Robie, Esquire, Greeting.

Having taken into our Royal consideration the loyalty, integrity, and ability of you the said Simon Bradstreet Robie, do by these presents constitute and appoint you to be Master and Chief Clerk of the Rolls and Records in and belonging to our Court of Chancery of and in our said Province of Nova Scotia. To have, hold, exercise, and enjoy the said office of Master and Chief Clerk of the Rolls and Records of our said Court of Chancery with you the said Simon Bradstreet Robie during our pleasure, together with all the powers and authorities to said office belonging, with

all and singular the rights, salaries, fees, profits, and advantages thereunto belonging, in as full and ample a manner as the same can be held and enjoyed. In testimony whereof, etc., etc., witness our trusty and well-beloved Lieutenant-General, General Sir James Kempt, Lieutenant-Governor, Commander-in-Chief, and Chancellor, etc.

Dated 5th December, 1825."

Mr. Robie entered on the duties of his office, attending to all the judicial work prior to this date performed by the Chancellor. The Minute Book of Chancery kept during his time indicates that the usual business of a Court of Equity was carried on before him as Judge of the Court. After glancing through the various entries of causes and matters heard before him, I find nothing of special note except the additional rules first passed during his term of office, to which I have already made allusion.

On the 5th August, 1834, Charles Rufus Fairbanks was appointed Master of the Rolls on the resignation of Mr. Robie, and filled that position until his death in 1841. I find in the record books the following account of his first taking his seat as Master of the Rolls:

"Monday, 18th August, 1834.

"The Court opened in the Court House in the Province Building this day at 11 o'clock.

Present—His Honour Charles Rufus Fairbanks, Master of the Rolls.
Nathaniel W. White, Registrar.
John James Sawyer, Sheriff of Halifax.
The Crier.
The Attorney-General and the Counsel and Solicitors practising in Chancery.

His Honour directed the commission for his appointment to the office of Master of the Rolls to be read, and this being read it was ordered to be entered in the minutes.

His Honour intimated to the bar that the Rolls Court would for the present, and until further order herein, be held regularly on the first and third Mondays of every month

(except during the terms of the Supreme Court), and on such other days as should be particularly appointed. That the Court would sit in the Court House in the Province Building, which, with the approbation of the Chancellor, had been appointed by his Honour as most suitable for the public proceedings of the Court, and would be attended by the sheriff and other officers, and that gentleman of the bar would require to appear in professional costume."

One would infer from reading this order that the sittings of the Court of Chancery before Mr. Fairbanks's time had not been open to the public, or at least had not been held in the Court House where the public could attend, and that gentlemen of the bar had been heard without being in proper dress. I should be inclined to draw the conclusion from this and other circumstances that in Mr. Robie's day Chancery proceedings were conducted in a loose and informal manner, which Mr. Fairbanks was determined to correct. I find a record in the Chancery Minute Book at p. 40 which is of some importance as showing that when the Chancellor presided in the Court after the Master of the Rolls was appointed, he was assisted by the common law Judges. The entry is as follows:

"THURSDAY AND FRIDAY 14TH & 15TH MAY, 1835.

Present—The Chancellor.
The Chief Justice.
Mr. Justice Hill,
Mr. Justice Bliss.

Cause: Gussie v. Miller.

This cause was heard on exceptions."

On the 19th May, 1835, is this entry, showing some friction between the Chancellor and the common law Judges:

"TUESDAY, MAY 19, 1838.

Court of Chancery opened.
Present—The Chancellor,
The Master of the Rolls,
Mr. Nutting and The Registrar.

The Chancellor directed the Registrar to address a note to the Chief Justice and other Judges to inquire if they meant to attend the Court this morning according to the adjournment made by the Chief Justice. His Excellency waiting for an answer, and the bar in attendance. After waiting until 12 o'clock, and the Judges not attending, his Excellency had a paper written by himself setting forth that he had attended and waited for an hour, and having had no intimation from them that they would not attend, he would adjourn the Court until to-morrow, Wednesday, at 12 o'clock."

On Wednesday 20th May, 1835, follows this entry: "The Court opened in the Council Chamber—Present, the Master of the Rolls and the Registrar.

Captain Campbell, A.D.C., delivered to his Honour a message from his Excellency stating that being engaged in Council he could not attend the Court and did not know when he could come down. His Honour then adjourned the Court until Monday next at 11 o'clock." Beyond these extracts, I have observed nothing of consequence to note in the Chancery proceedings during Mr. Fairbanks's period of office. There was evidently a large amount of the ordinary business transacted, as the minute book shows, and I have always understood that Mr. Fairbanks was an efficient and able Judge.

Samuel G. W. Archibald succeeded Fairbanks as Master of the Rolls on the 28th April, 1841, and held the office until his death in 1846. The fame of his eloquence as an orator, and the important part he played in the public affairs of Nova Scotia, are too well known to need any further reference on my part. His life was written years ago, in which all particulars have been given to the world. He had been one of the foremost lawyers in the Province, and enjoyed a large practice in the Court of Chancery, as the records disclose. As in the time of his predecesors, I find nothing of an interesting or remarkable character in the Chancery records during his term to make mention of. All the business of the Court seems to have been in the usual channel.

It is unfortunate that no reported decision of our first three Masters of the Rolls remains, and except the decrees they made we have no material from which to form an opinion of their qualifications as Equity Judges. There are yet living persons who remember both Fairbanks and Archibald, and who speak of them both as men of high ability and integrity.

Mr. Longworth in his life of Mr. Archibald, at p. 156, makes the following reference to him as a Judge: "Mr. Archibald soon had an opportunity of displaying his judicial qualities in his new position. The sound common sense which distinguished his judgments, and which after all forms the foundation of law, and equity—the clearness and precision with which the principles underlying the case were announced and applied—gave a character to his decrees which was not generally expected on the part of the bar. Had he ascended the bench earlier in life, he would undoubtedly have left behind him a reputation as a jurist not inferior to that of almost any of the distinguished men who have held office as Judges in Nova Scotia."

I have not been able to find the decisions or decrees to which Mr. Longworth alludes, but presume he makes the statement from the recollections of lawyers who knew and heard Mr. Archibald.

The fourth and last Master of the Rolls of this Province was Alexander Stewart, appointed on the 20th May, 1846, on the death of Mr. Archibald. Like his predecessor, he had taken a leading and distinguished part in the public affairs of this Province, and was regarded as a lawyer of eminent ability and learning and uprightness of character. To many of the present generation he was well known, and we are fortunate in having a few of his decisions reported, which bear testimony to the justice of the reputation he enjoyed as a Judge. He remained Master of the Rolls until the Court of Chancery was abolished in the year 1856. It was during his term of office that the agitation commenced which ultimately resulted in that important measure, and to which I will shortly turn my attention.

With this brief reference to the four Masters of the Rolls, I must pass on to other matters bearing on the constitution and proceedings of the Court. I have before mentioned that, with the exception of two Acts fixing the fees to be taken, no legislation affecting the Court was enacted until 1826, when the Act was passed providing a salary for the Master of the Rolls. I have also pointed out that the Chancellor ordinarily presided as sole Judge, with two or more Masters in Chancery as his assessors or advisers. The Masters, however, had no judicial authority. Their powers, as shewn by their commissions, were similar to those possessed by Masters in Chancery in England or Ireland at that time. On the appointment of a Master of the Rolls their assistance was no longer required, and from the records it is evident they did not sit with him. I observe, however, in some few cases where the Master of the Rolls was disqualified from interest or other cause, the senior Master in Chancery, at that time Mr. Nutting, sat as Judge and decided the matters coming before him. In some other instances the Chancellor himself sat and heard the cases, assisted by the common law Judges. About the year 1832 great and growing dissatisfaction was aroused from the expense and delay in the Chancery Court. As a consequence, the statute 2 Wm. IV. ch. 42 was passed, entitled "An Act for appointing commissioners to inquire into and report upon the expediency of reforming the practice and proceedings in the Courts of Law and Equity." etc. The preamble, after reciting that whereas it has become necessary to revise the civil and criminal codes of this Province, and to render the practice of the Courts of Law and Equity more simple and less expensive, then proceeded to outline the appointment of five commissioners to deal with the subject and report to the Lieutenant-Governor.

Chapter 19 of 3 Wm. IV. was an Act passed for the more easy redemption and foreclosure of mortgages, but the results of the report more fully appear in ch. 52 of 3 Wm. IV., "An Act for amending the practice of the Court of Chancery and diminishing the expenses thereof."

Sec. 1 empowers and requires the Master of the Rolls and Chancellor from time to time to make such rules and course of practice as will reduce the great prolixity, expense, and delays of the proceedings, business, and pleadings under the present practice, as shall be deemed most expedient and effectual for the ease of the suitors therein.

Sec. 2 enacts that in all matters not regulated by the present practice, or the rules and orders to be made, the practice of the High Court of Chancery in England shall be followed until the same shall be changed under the Act.

Sec. 3 abolishes certain formal proceedings, etc.

Sec. 4 enables the Court of Chancery to use the same powers of execution to enforce its judgments and decrees as are in use in the Supreme Court.

Sec. 5 enables the Chancellor to establish a proper seal for the Court.

Sec. 6 enables the Master of the Rolls to sign all orders and decrees made by him, and in case of decrees makes the Chancellor's signature unnecessary when he is absent from Halifax, but provides that the enrolment of all decrees be signed by the Chancellor. It further constitutes the Master of the Rolls the responsible adviser and Judge of the said Chancery Court.

Sec. 7 provides that a Master Extraordinary of said Court shall be commissioned and appointed in each county or district of the Province, and gives every such Master power to administer oaths in proceedings to be had in the Court and to act as an Examiner of said Court.

Sec. 8 validates all sales of real estate made under decrees of the Court, and empowers sales to be made by the Court in future.

Secs. 9 and 10 refer to matters not necessary to observe upon here.

Sec. 11 extends to the Court of Chancery the right to take evidence *de bene esse* as in the Supreme Court.

Sec. 12 enables the Court of Chancery to permit the examination of witnesses *viva voce* before the Court.

From a consideration of this statute it will be seen that a number of useful reforms were made. For the first time the Master of the Rolls is constituted by statute a Judge in Chancery with extended powers. It would seem that up to this time the Chancellor's signature was necessary to the validity of all rules and orders, but this is now dispensed with, and in decrees when he is absent from the Province. The process of the Court is simplified in respect to execution of decrees, and a settled mode of procedure ratified by statute, and I should think a very great improvement was made in allowing witnesses to be examined *viva voce* in Court. Hitherto the practice was to have them examined by means of interrogatories before examiners, which can never be as satisfactory as in open Court. I observe that Stewart signed all rules with the statutory title of Responsible Adviser and Judge of the Court of Chancery.

I have already adverted to the rules and orders which were passed and the great reforms eventually effected in the proceedings in Chancery under the authority of this statute.

One curious feature is brought out by the statute 5 Wm. IV. ch. 26, that the then Master of the Rolls, Mr. Fairbanks, was at the same time a member of the House of Assembly. It was then provided that thereafter no person holding the office of the Master of the Rolls or Judge of the Court of Vice-Admiralty should be eligible to be elected, and further provision was made for Mr. Fairbanks to resign his seat. It strikes one as singular that a Judge should have been permitted to retain a seat in the Legislature, but I believe it is not without precedent in England, where the Master of the Rolls at one time sat in the House of Commons.

In 1848, chap. 21 of 11 Vic. was passed, making the Judges of the Supreme Court and Master of the Rolls independent of the Crown. It provides that, notwithstanding their commissions are only during pleasure, and that on the demise of her Majesty they would become vacant, they should hold their respective offices during good behaviour, and that they should not cease to hold them by

reason of the death of the Sovereign. It further provides that in case of any vacancy it shall be lawful for the Governor, under the Great Seal of the Province, to appoint a fit and proper person until the Royal pleasure shall be known.

The statutes which I have mentioned comprise all the legislation touching the Court of Chancery until the final Act was passed in 1855 which swept it out of existence, and to the consideration of which I now turn.

The statute which completed the destruction of the Court of Chancery in this Province was passed in the session of 1855. It is chapter 23, entitled "An Act for abolishing the Court of Chancery and conferring Equity Jurisdiction on the Supreme Court."

Sec. 1 provides that "the Supreme Court shall have jurisdiction in all cases heretofore determinable by the Court of Chancery, and shall exercise the like powers and apply the same principles of equity as justice may require, and as have heretofore been administered in that Court."

Sec. 2 provides that the practice of the Supreme Court now or hereafter to be established as far as it is applicable thereto shall be observed, and in any case where the provisions of the practice and this Act shall not apply, the practive of the English Court of Chancery shall be adopted.

The remaining sections make further provisions respecting jurisdiction and procedure in the Supreme Court in equitable suits, provide a pension for the Master of the Rolls, the Hon. Alexander Stewart, and the Registrar; and the concluding section brings the Act into operation on 1st August, 1856.

Thus was brought to its end, after an existence of more than a century, the old Court of Chancery in the Province of Nova Scotia. Opinions have varied, and doubtless will always vary, as to the wisdom of this step. The passage of time—now nearly half a century—has greatly obscured some of the underlying causes which led to such a momentous change in our judicial procedure. It is doubtful if these will ever be perfectly understood, but from the newspaper

discussions at the time, the reports made to the Legislature, and the debates in the House of Assembly, we can to some extent judge of the spirit and motives which influenced the Legislature.

The spirit of judicial reform was in the air, not only as regards the Court of Chancery, but also the other Courts of the Province. On 1st February, 1849, the House of Assembly passed a resolution that a "committee be appointed to inquire into the general jurisprudence of the Province and practice of the Supreme Court, and to report to this House by bill, or otherwise." On this committee were Howe, Johnston, Young, Harrington, Henry, Marshall, and Creelman. Nothing appears to have resulted from the labours of this committee. On the 4th March, 1851, a resolution was passed to appoint a select committee to take into consideration the propriety of abolishing the Court of Chancery, on which were appointed Johnston, Marshall, Harrington, Young, Henry, Killam, and Fulton, and on the 28th March, 1851, Mr. Henry reported and presented a bill to abolish the Court of Chancery and to transfer Equity jurisdiction to the Supreme Court. This bill passed the lower House, but was thrown out by the Legislative Council. As a result of this, on the 7th April, 1851, Mr. Johnston moved that a commission be appointed to inquire into the practice and proceedings of the Courts of Law and Equity with a view of transfer of the Equity to the common law jurisdiction, if it be practicable, and to prepare a bill. The commissioners appointed were Brenton Haliburton, C.J., Mr. Justice Bliss, J. B. Uniacke, and W. A. Henry. Their report is to be found in the House of Assembly Journals, 1852, Appendix No. 73. After reporting elaborately on the proposed changes in the practice of the Supreme Court, they make the following observations:

"Although the expediency of transferring the jurisdiction of the Court of Chancery to the Court of common law has been under our consideration, neither the time at our command, nor the materials and information within our

reach, have been such as to enable the commissioners to arrive at any conclusion, and having perceived the question of Chancery reform has been submitted to the consideration of a commission in England, whose report has been submitted to Parliament, they have been influenced by a desire to avail themselves of the result of the investigation before coming to a conclusion on this difficult and important branch of their inquiries."

It will be interesting to call attention here to a fact which appears from correspondence published in the Journals of the House of 1852, that the bill for the abolition of the Court had been introduced, and passed the Assembly without even giving notice to the Master of the Rolls of such intention, apart from the still more remarkable fact that no report or investigation on the subject had been laid before the House. This is noted here as indicative of the spirit which must have inspired the governing parties in the Legislature in respect to the Court, and the Master of the Rolls.

Their final reports on the abolition of the Court of Chancery will be found in the Assembly Journals, 1853, Appendix No. 16. The commissioners were unable to agree on any report and were requested to submit their individual views. Only three did so. Mr. Young gave his own views, and whatever may be our opinion on the question, a perusal of this paper does not show that profound and practical knowledge which we should expect from a legislator and lawyer of his experience. On the other hand, the views of the chief Justice and Judge Bliss display the result of long experience and thorough acquaintance with the whole subject, expressed in vigorous and clear language. While Mr. Young in strong terms contended for the suppression of the Court, the Chief Justice and Judge Bliss pointed out the erroneous theory on which those who desired it abolished were building, and exposed the failure to which it was doomed, and the very mischiefs which afterwards followed. The ablest defence, however, made for the Court was by the Master of the Rolls himself. This defence is not to be found in the Journals of

the Assembly, although it was in the form of a letter addressed to the commissioners, and he requested its publication with their report. Why it should have been excluded does not appear, but Stewart took care to have it recorded in the record books of the Court. It is too long to be reproduced here, but some of the points deserve notice. The principal grounds urged for the abolition of the Court are no doubt fully expressed in Mr. Young's speech introducing the bill in the session of 1855. "The great objection," says Mr. Young, "to the Chancery as now constituted is that its forms, delays, and expensive machinery exclude a vast amount of business which ought to be adjudicated on by it."

The answer to these charges in Stewart's letter to the commissioners is very decisive and the facts in support strong. He points to the great reforms and changes which had been made within recent years, simplifying the practice, and lopping off many useless forms in the conduct of the proceedings. In this both the Chief Justice and Judge Bliss corroborate his statements in their reports. As to delays, he significantly calls their attention to the fact that not one cause remained in his Court undisposed of which had been heard before him. In respect to expenses, while giving figures to show that they are not large in comparison with other Courts, he at the same time reminds them that the scale of costs and fees to be taken are fixed by the Legislature, and not by him. After explaining at some length the objections to the proposed transfer of the Chancery business to the common law Courts, he challenges those who are making and repeating the charges against the Court to come forward with proof of them. This was never done. On 30th March, 1853, a resolution was passed requesting the Lieutenant-Governor to appoint a commission of suitable persons to prepare a bill for the abolition of the Court of Chancery. The Act was founded on that report to which I have above referred, and which with the letter of the Master of the Rolls will be found published in extenso in a pamphlet embracing all the papers on the history of this Court in Nova Scotia.

Now, apart from the action of the House of Assembly which I have briefly summarized, it is plain to those who read the speeches and newspapers of the day that other motives contributed to the result. Stewart was a man of strong and independent character, and in the course of his political career had aroused the bitter enmity of his opponents, and had also incurred the ill-will of some of his former colleagues. Among them were the most prominent lawyers of the time on both sides of politics. In striking a blow at the Court, they were striking a blow at him, and to some extent at least it would seem that the Court owed its extinction to the dislike felt towards the head of it. This offers the best explanation of the unanimity with which all parties acted. Whether on the whole a mistake was committed in abolishing the Court of Chancery or not, is fairly open to argument. Looking at the question in the light of experience, I come to the conclusion that the administration of law and equity by one tribunal is best, and most conducive to the interests of suitors, and in so far as that was the object of the Legislature it was wise. This object, however, was not accomplished except in name, for our legislators of that day had not grasped the basis on which the fusion of law and equity could be brought about. Indeed, it was not successfully accomplished in England for many years after, and then only after most patient and searching investigation by the greatest legal minds in the country. What it did effect was a serious muddle in the administration of justice, and its result was most injurious in its effects on the legal profession. It is easy to destroy an old existing institution, but it takes time and men of genius, knowledge, and experience to reconstruct. The best evidence of the mistake then committed was that in the very short period of eight years the Legislature found it necessary in the public interests to re-establish the same Court under another name—the Court of Equity—to the Judge of which all equitable business was again exclusively assigned. Great injury was brought upon the legal profession by the abolition of the Court of Chancery, in leading to the neglect of the study of equity juris-

prudence. The lawyers of the succeeding generation, and until the Judicature Act was adopted in this Province, devoted their energies almost entirely to the common law; not realizing the necessity, they rarely acquired any thorough knowledge of equity principles and procedure. Equity as administered in the Court of law — at least up to the time the late Mr. Justice Ritchie became Equity Judge—was not remarkable for its depth and learning and adherence to sound principles, and there was little encouragement to pursue it.

Happily, this defect in our Provincial bar has been removed, and we have able and experienced equity lawyers practising in our Courts, capable of holding a first place in any Court in the British dominions. The rising generation of lawyers are now taught and imbued with a general knowledge of equity jurisprudence without which it would now be impossible to follow their profession.

Although not immediately bearing on my subject, it may be interesting in conclusion to state that by chap. 10 of the Acts of 1864, the Court of Chancery under the name of the Court of Equity was re-established, using the procedure of the Supreme Court as far as applicable, but it was found necessary largely to amend this to adapt it to equitable proceedings. That distinguished lawyer and legislator, the Hon. James W. Johnston, was appointed to the office of Equity Judge, and at his death he was succeeded by the eminent and well-known Judge, John W. Ritchie. On his death he was succeeded by Alexander James, who was then a Judge of the Supreme Court. During his time the Equity Court as a distinct tribunal was again abolished in 1884, when the Judicature Act came into operation. The fusion of law and equity was then in reality accomplished, and both are now administered by all the Judges of the Supreme Court. The title is still retained by Mr. Justice Graham, who, as such, has jurisdiction in the Court of Marriage and Divorce, but in other respects his position is the same as the other Judges.

This completes the history of three of our principal Courts of Judicature, that is to say, the Supreme Court, the

Inferior Court of Common Pleas, and the Court of Chancery. There remains to be written the history of the Court of Vice-Admiralty—which from all I have observed will form a very interesting chapter in our judicial annals — the Court of Probate, the Court of Marriage and Divorce, the Court of Error and Appeal, and the Court of Escheats. My object in placing the history of these tribunals before the public has been to rescue from oblivion many interesting and important facts, scattered around in our Court and Provincial records, not easily, or at least not readily, attainable by those desiring to know something about them. It has always appeared to me that at least members of the legal profession should possess this knowledge, and that it should not be altogether uninteresting to the general public.

The particulars I have given, it is to be understood, are by no means exhaustive of the subject, and for those who desire more extended information I would refer them to the Chancery and Provincial records from which I have gathered these fragments.